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TAGORE LAW LECTURES—1871.

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Tagore Law Lectures—1871.

THE HINDU LAW:

BEING

A TREATISE ON THE LAW ADMINISTERED EXCLUSIVELY
TO HINDUS

BY THE

BRITISH COURTS IN INDIA.

BY

HERBERT COWELL, Esq.,

BARRISTER-AT-LAW, AND TAGORE LAW PROFESSOR.

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PREFACE.

THIS Volume concludes the subject of Hindu Law. It is published in continuation of a former series of Lectures delivered in Calcutta in pursuance of the will of the late Baboo Prosonnocomar Tagore. My next course will be upon the History and Constitution of the Courts and Legislative Authorities in India.

H. C.

CALCUTTA, *August* 31, 1871.

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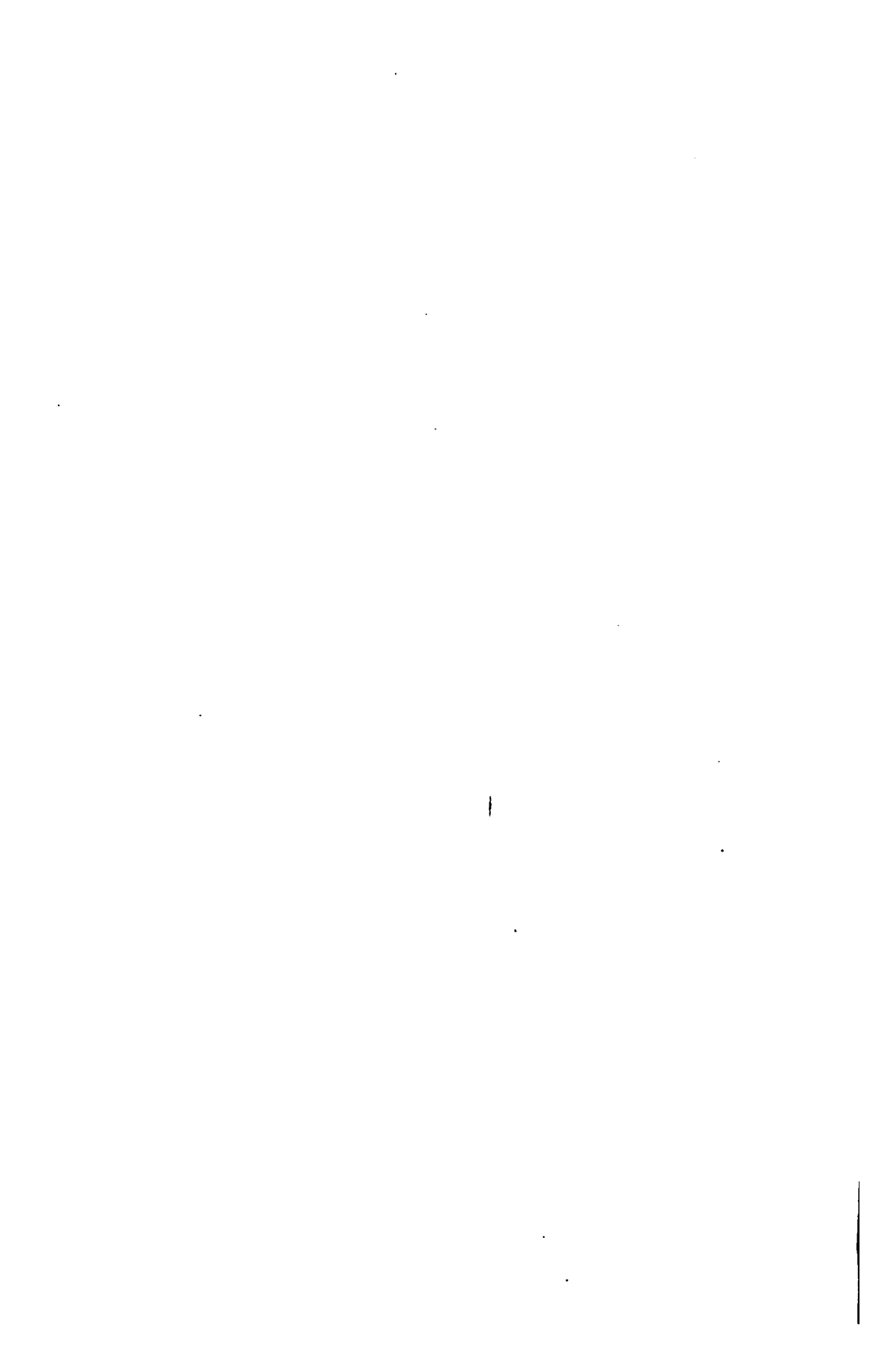


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LECTURE I.

ALIENATION.

ERRATA.

Page 99, in line 12, for *right* read *rights*.

Page 102, in line 11, for *classes* read *claims*.

larger portion of this year's course of lectures, I shall treat of that part of Hindu law which has been least affected by the external influences of contact with other communities and legal systems. The rules which govern their intestate inheritance and partition of joint property are so completely the concern of Hindus alone that they have been wholly unaffected by the absorption of that race into

LECTURE
I.
the general community of the British Empire in India, and consequently have been least affected by the administration of them by English Courts.

I have already defined the sources of Hindu law, and have dwelt upon the necessity of referring to the decisions of the established Courts of Justice as containing its latest and most authoritative development. This work is intended to explain the rules of law actually in force and administered in British territories at the present day, not to engage in antiquarian discussions, or to re-open any controversies which time and authority have closed.

It seemed to me of more practical advantage to recognize that Hindus have not been free British subjects for a century, incorporated with English and other races into one general community, without a proportionate influence being exercised upon their laws, and especially upon those which do not entirely relate to their own internal governance, and thereupon to trace the extent of that influence, than to stigmatize every change which has been made as the result of ignorance of their law or as breach of faith, with respect to the engagements which secured to them the benefit of their laws and customs. Hindu law was secured to the Hindus in 1781. It is not to be supposed that no alteration or improvement therein was forbidden to be made. Laws, like all other institutions, are constantly wearing out and require amendment and adaptation to the circumstances of changing times. And in the case of Hindus, the only provision which was made for the purpose of developing their law and regulating the course of its administration, was the establishment of English Courts and English Legislatures. The same Power which conceded to Hindus the right to be governed by their own law, undertook

its exposition and administration. The gradual dissolution of family dependence, the substitution to a great extent of individual rights and duties, the separation between the legal and religious aspects of their institutions, the division between legal obligations and religious duties, have been the leading features of English administration of Hindu law. I have endeavoured to show the spirit, and trace the result of that administration and the character of the changes which have been effected and selected as the most favourable branch of the subject for that purpose the Hindu family system, including the law of adoption. In order to present a complete view of that subject, it was necessary to discuss the joint estate, and to anticipate the present course by dealing to some slight extent with the subject of proprietary rights, and especially of the different theories of the Mitakshara and the Dayabhaga, with reference to joint property. In doing so, I incidentally referred to the power of alienation, a subject in reference to which there have been some uncertainty and vacillation. And in continuation of that subject, thus referred to in the fourth lecture of last year, I propose to review the existing state of the law which regulates the transfer of proprietary right according to the different schools.

The notion of full ownership involves the idea of an absolute power of alienation. Amongst Hindus, full ownership usually resided in the joint family as the unit of society, and not in the individual. In by far the larger portion of India, it continues so to do at the present day. Whatever moral prohibitions there may be in Hindu law against the transfer of the property on which unborn children must depend for their subsistence, there is no limitation on the power of alienation imposed by law on the living mem-

Power of
alienation.

LECTURE
I.

bers of a family in favour of those who are unborn at the time it is exercised. The thing itself is always transferable; the disability to transfer arises from the internal governance of the family, from sex, or from the existence of rights to maintenance, which for a time fetter the exercise of rights of ownership. Whatever conflicting rights in the property there may be which impede alienation, they always centre in living persons. Hindu law does not impose restrictions on proprietary rights or their exercise in favour of unborn generations or individuals.

Under the
Bengal
school.

According to the Bengal school,* a man may dispose of his property, moveable or immovable, ancestral or self-acquired, as he pleases, by gift, sale, or will.

The individual has in that school, to a very great extent, superseded the family as the owner of property, and his rights are absolute, whether over his self-acquired estate or his share of the joint estate. In no case does he require the concurrence of a co-owner in his alienation, nor is he impeded in any way, except when an ancestor's widow or other person has a charge on the estate in his hands sufficient to entitle her to a share in case of partition, or at least sufficient to form an encumbrance on the property.† It has been held that a Hindu, according to that school, cannot turn his father's widow and the other females of the family who are entitled to maintenance, out of the dwelling‡ selected by the father for his own residence, and in

* *Ganendra Mohan Tagore v. Upendra Mohan Tagore*, 4 B. L. R., O. C., p. 169; *Naga Lutchmee Ummal v. Gopoo Nadaraya Chetty*, 6 Moore's I. A., p. 344.

† *Mangala Debi v. Dinanath Bose*, 4 B. L. R., O. C., p. 81.

‡ See text of *Katyayana*, *Colebrooke's Digest*, Book II, Chap. IV, Sec. II, c. 19. "Except his whole estate and his dwelling-house, what remains after the food and clothing of the family, a man may give away,

which he left the females of his family at the time of his death. Such persons can assert a right to dwell in the family house and be maintained out of the family estate, into whosoever hands they may pass,* unless when they are sold expressly to provide the widow and other persons with the maintenance to which they are entitled.

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I.

And under Mitakshara law, in the rare instances where a man holds his property separately, whether because of its being self-acquired, or because of his taking at a partition and being without issue, his power of alienation is not restricted.

According
to the
Mitakshara.

A suit was determined by the High Court of Madras, in which a partition of joint property had been made, and a kararnamah executed at the same time. The kararnamah provided that the share of any allottee or of his heirs who died without issue should not be aliened, but divided by the other shareholders. The obvious purpose of the stipulation was to frustrate indefinitely the right of alienation, which was a legal incident of the absolute estate in severalty, created by the partition. The plaintiffs sued to enforce the stipulation, and to impeach an alienation made in spite of it. It was held that such stipulation was inoperative. An estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, nor is

(1) of
separate
property.

whatever it be, whether fixed or moveable; otherwise it may not be given." Whether the exception above contained expresses a moral precept, or involves a restriction upon a man's legal right to alienate, is not very clear. "It seems to me at present," said Sir B. Peacock, in the case above quoted, "that it is a restriction, and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once, of his own pleasure, turn out all the females of the family, or sell it, and give the purchaser a right to turn them out."

* See *ante*, Vol. I, Lecture VI, p. 141.

LECTURE I. there anything in Hindu law which will permit a departure from that principle.

(2) of self-acquired property.

And the Supreme Court at Calcutta held* that the possessor of property could not put a restraint upon the exercise by his descendants of the right of partition given by Hindu law. Hindus may by mutual contract impose on themselves an obligation restrictive of their proprietary rights; but they cannot annex hereditarily conditions to their estates which are incompatible with the beneficial rights incident thereto.

Under Mitakshara law, the power of alienation scarcely ever resides in the individual, except with regard to his self-acquired property. Some doubts formerly existed whether the title even to the self-acquired property of one member was not vested in the whole family, owing to some conflicting texts in the Mitakshara.† But according to a decision of the High Court of Bengal, in the case of *Muddun Gopal Thakoor v. Ram Buxk Pandey and others*,‡ it was declared that a father could, under Mitakshara law, alienate immovable property acquired by himself, and the same power of alienation would still more readily be extended to moveable property.

(8) of joint property.

Now, with regard to the ancestral estate under Mitakshara law, sons, grandsons, and great-grandsons have all of them a right in it by birth. The branch of the family thus formed in lineal relationship may be joint with the collateral branches. The joint estate is considered to belong to the whole family, including the infant members of it.

* Sir F. Macnaghten's *Considerations on Hindu Law*, p. 327.

† See *ante*, Vol. I, Lecture IV, p. 89.

‡ 6 S. W. R., p. 71; and see also *Bawa Misser v. Rajah Bishen Prokash Narain Singh*, 10 S. W. R., p. 287.

The proprietary right of each is created by birth, and not by conception. A child in the womb takes no estate, though for purposes of inheritance and succession the result of the conception must be awaited before succession takes place.* No individual member has any separate title to any part or share of the joint property until partition, and the shares to which the members will be entitled on partition are constantly varying by births, deaths, marriages, and so forth.†

It follows from this view that all the members of the family must, under Mitakshara law, jointly exercise the power of alienation over joint estates. But it often happens that some of them are minors, or incapable of contracting, whether by reason of absence, minority, or any other disabling cause. Such incapacity on the part of some of the members confers powers of alienation in certain cases of necessity upon the managing owner, which he would not possess under ordinary circumstances, or upon general principles of agency.‡

A father, therefore, under Mitakshara law, can alienate the ancestral estate for legal necessity, where there is a minor son; and it seems to follow that, assuming a legal necessity, his power of alienation would not be dependent on the minority of the son. A son who has attained the age of majority has no power to prevent his father's alienations of ancestral estate for the purpose of defraying joint debts, or of providing for family maintenance.§ He can interdict acts of waste; but if he does not do so,

* See *Mussamut Gouree Chowdrain v. Chummun Chowdry* and others, *per* Kemp, J., S. W. R. (1864), p. 342.

† *Sadabart Prasad Sahu v. Fulbash Koer*, 3 B. L. R., F. B., p. 39.

‡ *Goureenath v. The Collector of Monghyr*, 7 S. W. R., p. 5.

§ *Bisambhur Naik v. Sudasheeb Mohapatter*, 1 S. W. R., p. 96.

LECTURE I. — and is cognizant of the transaction, and especially if he derives any benefit from it, he will be held to have impliedly consented to it.

And as early as 1831, the Pundit of the late Bengal Sudder Court declared that, in conformity with the authorities current in Western India, the consent of the sons is not required when the alienations are legally necessary.* Under circumstances of necessity, the policy of the law confers upon the managing member the power to act for such of his co-parceners as are incapable of acting for themselves.

Power to bind an infant member in alienation of joint property.

The extent of the power thus conferred, and the extent to which the infant or other co-parcener for whom he acted will be bound, depend upon the nature and urgency of the circumstances under which the manager acted. The subject was discussed in 1863 by the late Supreme Court of Bombay,† with reference to the authority of a manager to carry on an ancestral family trade, so as to bind the infant member of the family by his transactions.

The Chief Justice said: "No case has been referred to in argument in which that question has been discussed, and I have been unable to find one; it must be decided as *res integra*, and by the application of established principles of law." He referred to the case of *Petum Doss v. Ramdhone Doss*,‡ in which Sir L. Peel decided that an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family. "In carrying on such a trade," the Supreme Court of Bombay proceeded,

* Babu Sheo Manog Singh v. Babu Ram Prakash Singh, 5 S. D. Rep., p. 145.

† See Ramlal Thakursidass v. Lakhmichand Muniram, 1 Bombay Reports (2nd edition), App., p. 51.

‡ Taylor's Reports, p. 279.

“ infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bond fide* trade dealings, should not be held bound to investigate the *status* of the family represented by the manager whilst dealing with him on the credit of the family property.” The Court further argued that unless the manager were clothed with such a power, the existence of an infant would ruin the family trade, if he, on his majority, were allowed to question all the trade transactions which took place in his infancy. He will be bound by acts of the family manager necessary for the carrying on of the trade.

In the case of *Trimbak Anant v. Gopal Shet*,* the High Court of Bombay said: “ It seems to us clear that where there is an undivided Hindu family comprising infant members, there must of necessity be some person to manage its concerns ; and if the manager sell family property to carry on the trade, if such an act be necessary and for the general good, it will be valid.” Moreover, it was held that if the purchaser, after reasonable enquiry, did in good faith believe that the vendor was the manager, and wanted the money for family purposes, he would be entitled to recover. A purchaser from a manager is only bound to enquire whether the money is wanted for legitimate purposes, and if satisfied that it is, he will be entitled to protection against the claim of any member

LECTURE
I

Power to
carry on a
family
trade.

* 1 Bombay H. C. Rep., A. C. J. (2nd ed.), p. 27.

LECTURE
I.

of an undivided family who is a minor at the time the transaction takes place: the latter must be held bound by the acts of his manager.

With regard to the acts which are necessarily incident to the carrying on of a trade, it is difficult to define them; but I believe they will be found to include all acts within the ordinary scope of the business which is being carried on. In the case before the Court, it was held that the compromise of partnership differences and accounts (the manager having entered into a partnership) by a division and transfer of partnership property, should not be treated as an act necessarily incident to the carrying on of a trade, but should be left to be governed by the law applicable to ordinary dealings with the manager of an undivided family when the interests of an infant member are concerned.

Infants, in general,—that is, setting aside the case of a joint family trade being carried on,—will only be bound by “necessary acts,” or such as are “evidently for their benefit.” By “necessary acts” are meant such as are necessary for the material existence of an undivided family, or the preservation of the family property, in addition to expenditure for religious ceremonies and marriages which for members of the family are by Hindu law and usage looked upon in the nature of paramount charges upon the undivided inheritance.

Right of
the son in
the joint
property.

The right of the father in the ancestral estate being thus limited, it becomes necessary to inquire what are the limitations upon the son's right therein. He has as coparcener a present proprietary interest, which, according to the later decisions of the Bombay and Bengal High Courts, extends to the whole estate, and will enable him to prevent or question any alienation for other than legal purposes of the

property in which he is interested. The Madras High Court, on the other hand, holds that the father has at least a full proprietary right or power of alienation over his own share, and that the son's right is simply as respects his own interests.

LECTURE
I

In the case of *I. Rayacharu v. I. V. Venkataramaniah*,* decided by the Madras High Court, the plaintiff sued as the only son of the defendant, for a declaration of his right to the whole of the ancestral property, moveable and immoveable, then in his father's possession, and that his father might be restrained from dissipating the property.

The High Court said, "a son has, during the life of his father, as co-parcener, a present proprietary interest in the ancestral property to the extent of his proper share, but beyond that he has vested in him no legal interest whatever whilst his father is alive. The father, to the extent of his own share as co-parcener is entitled to make valid dispositions, and it is not until his death that any interest arises to his son as heir.† Except in respect of his co-parcenary rights, a son is not, we think, in a different position as to the *corpus* of the ancestral property from that of any other relation who is an heir-apparent to the owner of the property." Whatever interest he possesses is the present proprietary one, not one which is reversionary.

Next with regard to the right of a co-parcener to alienate his own share under the Mitakshara law. In the case of *Sadabart Prasad Sahu v. Foolbash Koer*,‡ it was decided by a Full Bench of the High Court of Bengal that "no

Power of a
co-sharer
to alien his
share.

* 4 Madras High Court Reports, p. 60.

† See *Virasvami Gramini v. Ayyasvami Gramini*, 1 Mad. H. C. Rep., p. 471; and *Palainvelappa Kaundan v. Mannaru Naikan* and another, 2 Madras H. C. Rep., p. 416.

‡ 3 B. L. Rep., F. B., p. 39.

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I.

sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share." It was pointed out that if he could, he would thereby prejudice the rights of those who might afterwards be born, and who would at birth be entitled to share in the estate, including the portion conveyed away by the co-parcener. Although the whole family may, regardless of the interests of unborn descendants, aliene the whole estate, each co-parcener has not the same power over a share which, until partition has definitely ascertained it, is of variable extent, according as it is affected by subsequent births and deaths in the family.

As early as 1824* the question,—is it lawful for any one of the co-parceners, under the law as current in Behar, to transfer his share by sale or gift?—was answered by the Hindu law officers of the Bengal Sudder Dewanny Adawlut in the negative. "A gift of joint undivided property," they said, "whether real or personal, is not valid, even to the extent of the donor's share, for property cannot be sold or given away until it is defined or ascertained, which cannot be done without a division." The Court in that case acted upon the opinion so expressed by their officers.

The same question was subsequently put to other Hindu law officers of the same Court, and again answered in the same manner. The rule so established has ever since been very generally followed, notwithstanding the inconvenience which ensues. A similar rule, moreover, has been followed and acted upon by the late Sudder Court of the North-Western Provinces. In 1864 that Court held that in pro-

* *Nundoram and others v. Kashee Pandee and others*, Select Reports (new edition), Vol. III, p. 312.

vinces where the succession among Hindus is governed by the Benares Shastras, alienation of joint property, even to the extent of the alienor's own share, is invalid; but that if the property be partitioned, the transfer is legal.*

The High Court of Bombay formerly ruled to the contrary effect. It distinctly held that a member of an undivided Hindu family could both sell† and mortgage‡ his own undivided share of the family estate. But in 1866, notwithstanding its former decisions, it held§ that, in Western India, a member of an undivided Hindu family cannot, without the consent of his co-parceners, make a gift of his share in the undivided property or dispose of it by will.

On the other hand, the decisions of the late Madras Sudder Court and the present Madras High Court have been in favour of the validity of any alienation made by a co-parcener, under the Mitakshara law, of his undivided share in the joint family property.||

It is also the doctrine of the Mithila school, which follows the Mitakshara treatise, that a sale by one is void without the consent of all the co-sharers, or where there is no proof that the sale was made for a legal necessity.¶ Although the Vivada Chintamani is not so precise upon the subject as the Mitakshara, yet the silence or even the doubtful expressions of that treatise are never allowed to

* See judgment of Sir B. Peacock, in *Sadabart Prasad Sahu v. Foolbash Koer*, 3 B. L. R., F. B., p. 40.

† *Damodhur Vithal Khare v. Damodhur Huri Somana*, 1 Bom. Rep. (2nd edition), A. C. J., p. 182.

‡ *Gundo Mahadev v. Rambhat bin Bhaubat*, 1 Bom. H. C. Rep. (2nd edition), A. C. J., p. 39.

§ *Gangubai v. Ramanna*, 3 Bom. H. C. Rep., A. C. J., p. 66.

|| See *Virasvami Gramini v. Ayyasvami*, 1 Mad. H. C. Rep., p. 471.

¶ See *Sheo Pershad Jha v. Gunga Ram Jha*, 5 S. W. R., p. 221; and see *Kantoo Lall v. Greedharee Lall*, 9 S. W. R., p. 469.

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I.
—

overrule the Mitakshara. And that upon this subject, its teaching is in accord with that of the leading author is to be implied from the power of disposition which it expressly gives to the father over his self-acquired property. Sons have no ownership, it says, in the father's self-acquired property; and on the principle of *expressio unius exclusio alterius*, it follows that they have an interest in the father's ancestral estate. And consequently it was held in very early days by the late Supreme Court of Calcutta, that, according to Mithila law, a father and son possess equal rights in ancestral immoveable property, and consequently that a father cannot give the whole of it away to one son, to the exclusion of his other sons.*

Widows.

The difficulties in the way of alienating a joint estate under Mitakshara law spring solely from the legal incapacity on the part of some of the members to contract, not because the existing members of the family have not the full ownership between them. As respects Hindu women, the case is different. Although they have power over their *stridhun*, yet of the property which they inherit from their husbands, and of all property which is not *stridhun*, they have not the full ownership, but only the exclusive enjoyment. The consent of all the reversioners†—i. e., of all the existing next heirs of their husbands—is necessary to the validity of an alienation by a widow of the property of which she is in possession, except under such circumstances as are recognized as sufficient by Hindu law to allow and justify such alienation.

* Sham Singh v. Mussamut Umraotee, 2 Select Reports (new edition), p. 92.

† Mussamut Radha v. Mussamut Kour, W. R. (1864), p. 148. Only immediate reversioners, however, are allowed to impeach the sale by a widow.

As early as 1806, it was held by the Bengal Sudder Court, that whether a woman succeeds as widow or as mother, in either case she takes only a widow's estate. In both cases she is restricted from alienating, unless for necessary subsistence or for pious purposes, beneficial to the deceased, and then only to a moderate extent. She cannot, it was said by a Pundit in the case* cited below, settle it on one heir of her husband, while there is a possibility of a co-heir being born, who may be living at her death. The limitations on her power to aliene the whole estate absolutely are still maintained. But according to a Full Bench decision of the High Court of Bengal, she may aliene it for her life, the reversioners not being bound by the conveyance, nor able to question its validity so far as her own rights and interest therein are concerned.†

A widow, if she relinquishes in favour of reversioners, must do so in favour of those who are next in succession. If in favour of second reversioners, it must be with the consent of the first, then or afterwards expressed.‡

The nature and degree of the necessity which justifies an alienation of her husband's estate by a Hindu widow, and renders such alienation binding upon the reversioners, must be carefully attended to. It has been held§ that a purchaser for value is not bound to prove the antecedent economy or good conduct of a Hindu widow who

* *Mussamut Bijaya Debea v. Mussamut Unapoorna Dabea*, 1 Select Reports (new edition), p. 215. And see *P. Bachirajee v. V. Venkatapadu*, 2 Mad. H. C. Rep., 402, where there is a long discussion on this subject.

† *Gobindomonee Dosse v. Shamlall Bysack*, Suth. F. B. Rul., p. 165. And see *Gridharee Sing v. Koolahal Sing*, 6 S. W. R., P. C., 1.

‡ *Protab Chunder Roy Chowdry v. Joymonee Debia*, 1 S. W. R., p. 98.

§ *Kalicoomar Chowdhry v. Nundcoomar Chowdhry*, W. R. (1864), p. 153.

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I.

alienates a portion of her husband's estate, nor to account for the due appropriation of the purchase-money. But he is undoubtedly bound to use diligence in ascertaining that there is some legal necessity for the loan, and in case of the transaction being questioned, it will rest with him to prove the circumstances under which it was effected, and that those circumstances justified the alienation.* If there has been legal necessity, and the purchaser acts *bonâ fide* and pays a fair price, that is all that is required; he is not bound to see to the application of the purchase-money.†

Other
allowable
causes of
alienation.

With regard to the allowable causes of alienation, it is generally admitted that, for religious or charitable purposes, or for those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes.* The prohibitions against waste do not include such expenditure as may be deemed beneficial to her husband, as, for example, the performance of his funeral rites, gifts to his relations, the marriage of his daughters, and various charitable acts. "She whose husband is dead," it is said, "should support in proportion to her ability the same persons, and do the same acts in the same manner in which her husband, when living, supported those persons and did those acts. But it is not absolutely necessary that she should fulfil the same voluntary offices which her husband did, such as supporting *Brahmanas* resident in the same town and the like."‡

* Collector of Masulipatam v. Cavalry Vencata Narainapah, 2 W. R., P. C., p. 61.

† Ramgopal Ghose v. Bullodeb Bose, W. R. (1864), p. 385.

‡ Colebrooke's Digest, Book V, Chap. VIII, Section 399.

If the reversioners offer to supply the widow with money for her necessities, that act on their part will render any alienation, carried out in spite of it, invalid as against them.*

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I.

Although the widow is, according to the Bengal school, under restrictions with regard to her power of disposition over both her husband's† moveable and immoveable property, the Mitakshara school at least only enforces those restrictions with respect to the immoveable property, both ancestral and self-acquired.‡

Widows
under the
Mitak-
shara.

With regard to the moveable property of her deceased husband, the power of a Hindu widow, under Mitakshara law to aliene it, was for some time upheld by the Courts; though it is now finally denied by the Court of ultimate appeal.

Ancestral
estate.

According to a decision of the High Court of Bombay, she was held to have absolute power over the moveable property of her husband, at least on that side of India.§ The High Court of Bengal has come to a similar decision, with regard to cases governed by Mithila law, which is the same in this respect as the law of Mitakshara.||

Finally, however, the power of the Hindu widow under Mitakshara law to dispose of her husband's moveable property, even that which was self-acquired, was denied by the Privy Council, after full discussion in the case of *Bhugwandeem Doobey v. Myna Baee*.¶ The Sudder Court at Agra had held in the same case that the widow was competent to dispose of the inheritance from her husband,

* Shama Charan's Vyavastha Darpana, p. 57.

† See Lord Giffard's judgment in *Kasseenath Bysack v. Hurro-soonduree Debea*, Clarke's Rules and Orders (1834), p. 91.

‡ *Mussamut Thakoor Dayee v. Rai Balack Ram*, 10 S. W. R., P. C., p. 3.

§ *Bechar Bhagvan v. Bai Lakshmi*, 1 Bom. H. C. Rep. (2d edition), A. C. J., p. 56.

|| *Doorga Dayee v. Poorun Dayee*, 5 S. W. R., p. 141.

¶ 11 Moore's Indian Appeals, p. 487.

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when it was distinct and divided. It treated her power to dispose of the moveable property as certain, her power to dispose of the immoveable property as more open to question. Then a Full Bench of that Court decided that she was incompetent to dispose of either the moveable or immoveable property which she had inherited from her husband. The Privy Council held that it was settled law, according to the law of Benares, that a Hindu widow has not the power to dispose of immoveable property inherited from her husband to the prejudice of his next heirs. And with regard to the widow's power of disposition over moveables so derived, the Privy Council held that that also must be denied to her. They said:—"The reasons for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general."

Although the widow has this limited power of alienation, it does not follow that any conveyance in excess of such power is at once to be set aside. It is always good for her life-time, in the absence of direct fraud upon her. It was said in the Full Bench decision cited below* that reversionary heirs are not precluded even in the widow's life-time from suing to prevent waste or destruction of the property in which they are interested. At the same time it has been held† that the mere fact of alienation by the

* *Gobindmonee Dossee v. Shamloll Bysack*, B. L. R., Supp. Vol., p. 48.

† *Brinda Dabee Chowdrain v. Pearee Lall Chowdhry*, 9 W. R., p. 460; and see *Kamikapersad Roy v. Srimati Jagadamba Dasi*, 5 B. L. R., p. 508.

widow is not sufficient, without more, to give the reversioners a right of suit in her life-time. They must show that there is danger of waste sufficient to entitle them to present protection.*

There is no rule of Hindu law which compels a widow alienating any portion of her late husband's property to have recourse to a mortgage instead of a sale, in order to raise funds for her maintenance. The question whether she has exceeded her powers depends upon the necessities of the case, not upon the character of the alienation.†

Although the widow cannot, except for certain necessary purposes recognized by law, alienate her husband's estate, she nevertheless fully represents the estate as heir in possession for the time being.‡

Certain purchasers of the husband's estate, who bought at a sale held in execution of a decree for rent against the widow under Act VIII of 1838, were held to have acquired the ownership of the estate.§

Partition by two widows of their husband's estate would not have the effect of enlarging either widow's estate so as to give her a power of disposition which she would not otherwise have had.

With reference to the power of the mother to alienate her deceased husband's estate during the minority of her sons, the Pundit of the Sudder Court declared|| that, "if other means of subsistence existed, the mother's alienation during the minority of her sons is invalid, but to the extent of his interest it is binding on her son, who being adult, assented. If no other means of subsistence existed,

* See note at the end of this Lecture.

† *Nabakumar Haldar v. Bhabasundari Dassee*, 3. B. L. R., A. C., p. 375.

‡ See *Doe d Muddoosoodun Doss v. Mohenderlall Khan*, 2 Boulnois, p. 40; and *Goluckmoney Dabee v. Diggumber Day*, 2 Boulnois, p. 193.

§ *Rajkishen Sircar v. Chowdry J. Huq*, S. W. R. (1864), p. 351.

|| *Kishen Lochan Bose v. Tarinee Dassee*, 5 S. D. R., p. 55.

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the alienation for the support of herself and sons is valid, inasmuch as the sale occasioned by want is legal; and the provision of the means of litigation tended to promote support, for until the property were recovered no sale could be effected; besides the sale by a slave for the support of the family, being valid, the validity of a sale for the support of the owner himself was unimpugnable." In a subsequent Bengal case,* to be found in the Select Reports, the alienation by a mother during her son's minority, of his father's estate, to raise means to pay the father's debts and for support, was held, without reference to the pundits, to be legal under the Hindu law.

Daughters. Still less is the daughter competent, according to the Bengal school, to alienate by gift or sale, for other than legally necessary purposes, the ancestral property which she holds, to the detriment of the other heirs of her father. In a case governed by Mithila law, the Sudder Court of Bengal ruled to that effect.† In all the schools the daughter's right of succession is postponed to that of the widow. By Bengal law her prospect of bearing male issue is the chief ground for her claim to inherit from her father, while by Mithila law her son is excluded from his heirs.

It has been held that the expense incurred in performing the *shraddha* of a mother is not a legal necessity like the provision for a father's *shraddha*, to justify the sale by the daughter of her father's estate to the prejudice of the daughter's son.‡

Under the Mitakshara law, the daughter has greater power of alienation than she has under Bengal law; and

* Jagmohan Bose v. Pitambar Ghose, 5 S. D. R., p. 82.

† Mussamut Gyan Koowur v. Doobhan Sing, 4 Select Reports (new edition), p. 420.

‡ Raj Chunder Deb Biswas v. Sheeshoo Ram Deb, 7 S. W. R., p. 146.

her property, inherited from her father after marriage, is regarded as her *stridhun*, and she is free from the control of her husband with respect to her disposition of it.* LECTURE
I

With regard to the power of alienation by a *shebait* of *dewutter* property, it is said that it stands very much upon the same footing as that possessed by a Hindu widow. As regards his power to grant a putnee of the appropriated lands, it will depend upon the circumstances under which he attempts to do so,—whether his act, looking to all the circumstances of the case, is a wise and prudent act in respect of the purposes for which he is *shebait*. The purchasers, too, in order to prove the validity of their purchase, must show that they acted as *bonâ fide* and prudent purchasers would have acted, and satisfied themselves, as far as they could, that there was a fair and apparently sufficient ground of necessity made out.†

In point of legal power to alienate, a member of a Mitakshara joint family, a widow in a Bengal family, a *shebait* in reference to *dewutter* property, and a manager of an estate on account of an infant or other disqualified owner, stand very much upon the same footing. In all these cases a purchaser or incumbrancer must act in good faith;‡ he is bound to enquire into the necessity for the sale or loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the grantor is acting in the particular case from necessity, to provide for the benefit of the estate or to discharge burdens which the estate is liable to bear. But if he does so enquire and acts honestly, the real existence of an alleged and

* See *post*, pp. 29, 30.

† *Juggessur Buttobyal v. Rajah Roodro Narain Roy*, 12 S. W. R., p. 299.

‡ See *Hunoomanpersad Panday v. Mussamut Babool Munraj Koonwaree*, 6 Moore's I. A., p. 424.

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 — reasonably credited necessity is not a condition precedent to the validity of the transaction, nor is he bound to see to the application of the purchase-money.

Onus probandi.

No certain rule can be laid down with reference to the question upon whom will the burden rest of supporting a transaction which depends upon such considerations. In general, it will lie upon the purchaser or incumbrancer. He is presumably better acquainted with the immediate facts than the infant heir, or reversioner, or co-sharer who challenges the transaction; and he necessarily knows the limited character of the title to alienate. In the case of a widow, in addition to the circumstance of a limited power to alienate, there is the right to protection from undue influence to be attended to; and consequently no doubt can arise as to the liability of a purchaser to prove the validity of the transaction. He then stands in the same position as a solicitor who buys of his client, a guardian of his ward, or a trustee of his *cestui que trust*.

On the other hand, while guarding against *mala fides* on the part of the purchaser or lender, it is equally necessary to guard against *mala fides* on the part of those who may have reaped the benefit of the transaction, and yet seek to set it aside. Moreover, with regard especially to alienation of a joint estate by members of a Mitakshara family, the restrictions on their power, though inseparable from the nature of their rights in or title to their property, are extremely oppressive, and must tend considerably to diminish its value. A purchaser or mortgagor from the managing member of a Mitakshara joint family, takes with the certainty that the infant or absent members of the family can at any time inflict on him the penalty of a law suit; and that the probability of their doing so varies inversely with their capacity to pay the costs which may be incurred.

The saleable value of property belonging to Mitakshara families, or in the hands of other persons with limited power to alienate, is necessarily diminished in proportion as difficulties are unnecessarily thrown in the way of *bond fide* purchasers or incumbrancers supporting the validity of their transactions. And it would not diminish their security against waste, if persons who seek to set aside the alienations of a manager were obliged to allege and prove particular circumstances sufficient to raise a presumption that the transaction was an unjustifiable one—a presumption which it would be difficult or easy to raise, according as the price given was adequate or the reverse. The Privy Council has expressed the opinion that in such suits the question on whom does the *onus* of proof lie is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and be dependent on them. For instance, the *onus* of disproving an alienation may be cast on the plaintiffs in the particular case where sons of a living father are, with his suspected collusion, attempting, in a suit against a creditor or purchaser, to get rid of the charge or alienation effected by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. The lender or purchaser may reasonably be expected to prove the circumstances connected with his own particular transaction,—the facts which embody the representations made to him of the alleged necessity,—and the motives influencing the transaction. But he cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate. On the other hand, the antecedents of their father's career would be more likely to be in the knowledge of the sons than of a stranger. Lapse

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I.

of time, and apparent acquiescence of the parties interested are also circumstances to be considered in determining the question of liability to prove or disprove the validity of an alienation by a party whose title to alienate is limited.

NOTE.—The leading case, with respect to the right of reversioners to sue for the purpose of restraining waste by a Hindu widow in possession, is that of *Hurydoss Dutt v. Sreemutty Upoorva Dossee*,* decided by the Privy Council in 1856. It was brought by a party, entitled in reversion after the death of the daughter of an intestate Hindu, and proceeded on the ground, that the property was endangered from the manner in which she was dealing with it. The Privy Council considered that widow and daughter stand in the same situation to property which they respectively derive from their husband or father, at all events, as to the right of administration, and the right of enjoyment of it for their lives. They adhered to their own decision in *Cossinath Bysack v. Hurrosoondery Dossee*,† where they had held that the principles which are applied in Courts of Equity in England for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the case of property in India, when such property is in possession of a Hindu widow. It is not sufficient to say that there is one person entitled in possession, and another entitled in remainder, in order to induce the Court to interfere to take the property out of the hands of the individual who is in possession of it; but it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in which case only, the Court will interfere. An alienation by a Hindu widow is always good for her life-time, as against reversioners. In the ordinary course of things, their remedy is to sue at her death for recovery of the inheritance which then accrues to them; unless validly aliened by the widow. They are not, however, deprived of a remedy against the grantee from the widow during her life-time, to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient cause to justify the interference of the Court.‡ The foundation of their suit in the widow's life-time is the existence or danger of waste, giving them a present right to protection of their expectant interests.

* 6 Moore's Indian Appeals, p. 445.

† Clarke's Rules and Orders, Add. Ca., p. 91.

‡ Gobindmoni Dossee v. Shamloll Bysack, B. L. R., Supp. Vol., p. 48.

The remedy given is usually that the Court itself takes charge of the estate, either by appointing a receiver, or by itself taking possession of the funds. In *Mussamut Maharanee v. Nanda Lal, Misser*,* where a widow, having wasted her husband's estate, was sued by the husband's next heir to restrain waste, the lower Court decreed possession in his favour, and assigned maintenance to the widow, and directed that both their names should be registered as joint proprietors. The High Court held that the reversioner ought not to have been turned into an actual proprietor, but that a manager should have been appointed accountable to the Court for all his acts in respect to the estate, who should be required to render accounts periodically, and be put in possession of all the husband's property. If the reversioner were a fit person, he might be appointed.

LECTURE
I.

* Bengal Law Reports, Vol. I, A. C., p. 27.

LECTURE II.

ALIENATION.

Stridhun—How acquired—According to the Dayabhaga—According to the Mitakshara—Rulings of the Madras Court—of the Bombay Court—*Bhugwandeas Doobee v. Myna Baie*—Daughters' Stridhun—Alienation of Stridhun—Alienation completed by relinquishment and acceptance—Donee must be a sentient being—And clearly designated—Benamie transactions valid—Conditional alienation—Form of alienation—Verbal transfers valid—*Quare*, whether they must be followed by possession—Construction of deeds—Proof of them—Consideration—Voluntary transfers—Vendor's duty to make his title—Miscellaneous.

Stridhun. IN further discussing the power of disposition possessed by Hindu women, it becomes necessary to refer to the subject of *stridhun*, or women's property, which, notwithstanding expressions to the contrary in commentaries of the highest authority, must be distinguished from those proprietary interests which devolve upon them by inheritance from a husband, or in some cases from a father. The term is derived, according to Mr. Macnaghten and Sir T. Strange, from *sri*, female, and *dhana*, wealth. It does not necessarily mean money; it may consist of anything else of value, of land, or, as it more usually does, of jewels or other ornaments.

It is extremely important to distinguish between the property which a woman takes as her *stridhun* and that of which she enjoys the use during her life without power of alienation. *Stridhun*, however, is defined differently in the various schools and without sufficient clearness and preci-

sion to render it quite clear what was originally intended to be included under that term. LECTURE
II.

At the present time *stridhun* may be derived by gift, by earnings, and by inheritance. But not all property which is so derived is *stridhun*. If earned by the woman herself during marriage, the husband has power over it, inconsistent with the notion of her exclusive title. Gifts to her during marriage, in order to constitute *stridhun*, must not come from a strange source. With regard to gifts and earnings, a married woman would stand in a different position from an unmarried one. So also with regard to her inherited property; its character of *stridhun*, in some cases, will depend upon whether she is married or not, and upon her relationship to the person from whom she inherits. How ac-
quired.

To constitute *stridhun* by gift, the woman's property must have been the gift, not of a stranger, but of a husband, or some one or other of her near relatives.* If derived from a stranger, or earned by herself, it, as a general rule, vests in the husband, if she have one, and is unreservedly at his disposal. Menu† describes the six-fold separate property of a married woman to include gifts at her marriage from her husband and her own family; gifts after marriage from her husband and her husband's family.

As a general rule, that alone is considered to be *stridhun* over which a woman has power to give, sell, or use, independently of her husband's control.‡ According to the Dayabhaga, "her subsistence, her ornaments, her perquisites, and her gains are the separate property of a woman. She herself exclusively enjoys it, and her husband has no According
to the
Daya-
bhaga.

* 1 Strange's Hindu Law, p. 26.

† Menu, IX, verses 194 and 195.

‡ Dayabhaga, Chap. IV, Sec. I, verse 18.

LECTURE
II.

right to use it, except in distress." But almost immediately afterwards, it is said that* the husband has dominion and full control over that which has been received by her from any other than the family of her father, mother, or husband, or has been earned by her. He has a right to take it, even though no distress exists. Consequently, although the goods belong to her, they do not constitute woman's property, because she has not independent power over them.

A gift† of money by a son to his mother for the purposes of her maintenance comes within the definition of *stridhun* given in Hindu law.

The *stridhun* of a married woman belongs to her exclusively; but the husband has, however it may have been derived, a concurrent power over it, so that he may use it in any exigency for which he has not otherwise the means of providing; and this without being accountable afterwards for what he may have so applied.‡

According
to the
Mitak-
shara.

According to a passage in the Mitakshara,§ "property which she may have acquired by inheritance, purchase, partition, seizure, or finding, is denominated by Menu and the rest woman's property." This text seems to include all the known methods of acquisition, and would in fact give to Hindu women the absolute dominion over every kind of property which they may possess. It has not, however, been acted upon, or recognized as any authority for the doctrine that all property which has devolved upon a woman by inheritance is her *stridhun*.

* Dayabhaga, Chap. IV, Sec. I, verse 20.

† Mussamut Doorga Koonwar v. Mussamut Tejoo Koonwar, 5 S. W. R., Misc., p. 53.

‡ See Strange, Vol. I, p. 27.

§ See Chap. II, Sec. XI, verses 2 and 3.

Sir Thomas Strange* has made this comment upon the passage† in the Mitakshara:— “ With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than a trustee for the next heirs.” Such restriction, however, he says, concerns land only, for “ with regard to moveables she has a greater latitude;” and her *stridhun* “ being peculiarly hers, whatever falls under this description would seem to be not only hers without reserve for present use, but to be at her independent and uncontrollable disposal.” The High Court of Bengal‡ decided that the text does not refer to immoveable property inherited by a woman from her husband ; and subsequent decisions of the Privy Council show that it does not refer even to inherited moveables. On the other hand, in the case of *Mussamut Doorga Dayee v. Mussamut Poorun Dayee*,§ the High Court of Bengal held that, according to the Mitakshara, a widow had absolute power of alienation over the moveable property inherited by her from her husband.

The text in the Mitakshara has proved to be extremely difficult to reconcile with the ordinary Hindu law regarding the dependence of women and their limited interest in the property which they occasionally possess. It was said to

* Strange's Hindu Law, Vol. I, p. 246.

† Chap. II, Sec. XI, verse 2:—“ That which was given by the father, by the mother, by the husband. or by a brother : and that which was presented to the bride by the maternal uncles and the rest (as paternal uncles, maternal aunts, &c.) at the time of the wedding before the nuptial fire ; and a gift on a second marriage, or gratuity on account of supercession * * * , and also property which she may have acquired by inheritance, purchase, partition, seizure or finding, are denominated by Menu and the rest ‘ woman's property.’ ”

‡ *Goberdhun Nath v. Onoop Roy*, 3 S. W. R., p. 105.

§ *Indian Jurist* (N. S.), Vol. I, p. 128.

LECTURE
II.Rulings of
the Madras
Court.

be contrary to the authorities in the other schools of Hindu law, and not to be supported by the Smriti Chandrika. Accordingly, notwithstanding the explicitness with which it is worded, the Madras High Court has followed the Bengal authorities, and held that property inherited by a mother from her son is not her *stridhun*.^{*} In another case it was contended that property which a woman had inherited from her mother was her *stridhun*. The Madras High Court there ruled that property acquired by inheritance, whether from a husband, a son, or a mother, cannot be classed as *stridhun* in Southern India, any more than in any other parts of India.[†]

Of the
Bombay
Court.

Such a ruling would seem to imply that no property inherited by a married woman is her *stridhun*. The Bombay High Court,[‡] however, held that only that property, which is inherited by a married woman from members of her own family, becomes her *stridhun*. In inheriting from her husband, her son, or members of her own family, she takes, according to Mitakshara law, as *stridhun*.[§]

*Bhugwan-
deen Doobee
v. Myna
Baie.*

The doubt whether any portion of property which a widow inherits from her husband is *stridhun* under any school of Hindu law, seems to be entirely removed by the decision of the Privy Council in the case I have quoted in my last lecture, of *Bhugwandeem Doobee v. Myna Baie*.^{||} They said that, although they considered the passage in the Mitakshara to be somewhat ambiguous, inasmuch as it

^{*} P. Bachiraju v. V. Venkatappadu, 2 Mad. H. C. Rep., p. 402.

[†] Venjamalathammal v. Valaynda Mudali, 3 Mad. H. C. Rep., A. J., p. 312.

[‡] Janyatram v. Bai Jauma, 2 Bom. H. C. Rep., p. 10.

[§] See Narrappa Singappa v. Sibbaram Krishna, 6 Bom. H. C. Rep., A. C., p. 215; and Bhaskar Trimbak Acharya v. Mahadeo Ramji, 6 Bom. H. C. Rep., O. C., p. 1.

^{||} 11 Moore's I. A., p. 487; S. C., 9. S. W. R., P. C., p. 23.

included in the enumeration of a woman's *stridhun* "property which she may have acquired by inheritance," yet, it having been settled beyond all question that immoveable property inherited by a woman from her husband cannot be disposed of by her, and does not pass as her *stridhun*, the legitimate inference was that moveable property so inherited stood upon the same footing, and was also excluded from her *stridhun* and from her power of disposition.

LECTURE
II.

Upon the question whether a daughter who takes an estate by inheritance from her father, takes it as *stridhun*, or subject to the usual disabilities of a Hindu woman, the Bengal and Mitakshara schools are at variance. According to the former, the rule is laid down by Sir William Macnaghten, "in default of the widow, the daughter inherits, but neither is her interest absolute."^{*}

Daughter's
stridhun.

But the Mitakshara school, while it postpones the daughter in the order of succession to a greater extent than the Bengal school, vests in her, when she does succeed, a much larger proprietary right than would be recognized by the more modern doctrines. In fact, the daughter under such circumstances takes the estate as her *stridhun*—at least if she takes it after her marriage.

The author of the Mitakshara† cites a passage from Katayana: "What has been received by a woman from the family of her husband at a time posterior to her marriage is called a gift subsequent; and so is that which is similarly received from the family of her father." It is celebrated, he says, as woman's property. The author of the Mayakha‡ also includes in his definition of *stridhun*, a gift

* Macnaghten's Principles of Hindu Law, p. 21.

† Mitakshara, Chap. II, Sec. XI, verse 7.

‡ Vyavahara Mayakha, Chap. IV., Sec. X, verses 2 and 3.

LECTURE
II.

subsequent, and defines such gift to be "what has been received by a woman at a time subsequent to her marriage from the family of her husband," and also "that which has been similarly received from her own family."

Jagannatha, in his Digest,* considers that only that which is *given* to a woman by her father or her family after her marriage is her *stridhun*, not that which she has inherited from them. Following this authority, the doctrine of the Bengal school is that, whether the daughter be married or unmarried, the next heirs of the father living at her death take as reversioners after her death. But, according to the Mitakshara school, the daughter, if married, at her father's death takes his estate as *stridhun*; and if unmarried, she takes a larger estate than a widow, possibly an absolute estate.†

In the case of *Navalram Atmaram v. Nandkisher Shivnarayan*,‡ the High Court of Bombay having considered the remarks of Sir Thomas Strange,§ came to the conclusion that the interpretation adopted by the Southern authorities alluded to by him is the interpretation which is applicable in the Bombay Presidency, and that an inheritance descending on a daughter, a married woman, classes as *stridhun*, and descends accordingly.

Alienation
of stridhun.

With regard to a woman's power of alienation over her *stridhun*, I must refer to the case of *Doe d. Kullammál v. Kuppa Pillai*,|| in which the Chief Justice of the Madras High Court made these observations:—

* Colebrooke's Digest, Book V, Chap. IX, Secs. 470 and 475.

† See judgment of Chief Justice Sausse in *Praujwanda Tulsidas v. Deokuvaibai*, 1 Bom. H. C. Rep., O. C. J., p. 130 (2nd edition.)

‡ 1 Bom. H. C. Rep., A. C. J. (2nd edition), p. 209.

§ Strange's Hindu Law, Vol. I, pp. 139 and 140.

|| 1 Mad. H. C. Rep., p. 85.

“ Now there is no doubt that, according to Hindu law, land, as well as any other property,* may be possessed by a woman as *stridhun*; and after consulting all the authorities within our reach, we think the law must now be taken to be that, with respect to her *stridhun* (except, perhaps, land, the gift of her husband, as to which we at present say nothing), a widow is not subject to the restrictions against alienation which clearly apply to property that she succeeds to upon her husband's death. According to the Bengal school of law, it seems clear that, whether as wife or widow, a woman has an absolute power of alienation over her *stridhun*, with the exception of immoveable property bestowed upon her by her husband.† But, as is observed by Mr. Sutherland,‡ “ the Mitakshara is wholly silent on the subject of the power of women to alienate their peculiar property, though explicit in disavowing all authority in the husband to appropriate the same ;” and the language used by Sir Thomas Strange,§ as well as by Mr. Sutherland,|| when looked at alone, tends to raise a doubt whether, according to the Benares school of law, there is not a general restriction against alienation by a wife or a widow of *immoveable* property held by her under whatever title. When, however, we find it stated in the same work and by numerous other authorities, in broad and general terms, that a woman's *stridhun* is her absolute property and at her independent disposal (with, perhaps, as before alluded to, the exception of land, the gift of her husband); and

* Mitakshara, Chap. I, Sec. II, verses 1 to 3.

† Dayabhaga, Chap. IV, Sec. I, verses 21 to 23.

‡ See Strange's Hindu Law, Vol. II, p. 430.

§ See Vol. I, p. 247.

|| See Vol. II, p. 21.

LECTURE
II

there being no ground that we can see for any distinction in this respect between moveable and immoveable property held by a woman, we are of opinion that the Hindu law recognizes the power of alienation to the extent we have just laid down.”*

In the case of *Mussamut Mahon Dayhee v. Rai Balack Ram*,† it appeared that a Hindu widow died possessed of certain property. The question was whether her husband's property, which was both moveable and immoveable, and governed by the law of the Benares school, descended at her death to the reversionary heirs of her husband, or passed under a deed of gift alleged to have been executed by her, shortly before her death, to her niece. The evidence failed to establish the deed of gift. It was nevertheless considered that the right of the reversionary heirs depended in some degree on the nature of the widow's estate. The result of the authorities was stated by the Privy Council to be, that although, according to the law of the Western schools, the widow may have a power of disposing of moveable property inherited from her husband which she has not under the law of Bengal, she is, by the one law as by the other, restricted from aliening any immoveable property which she has so inherited; that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heir of her husband; and that no distinction can be taken between that portion of the property which is ancestral and that which is acquired.

* See the following authorities:—Sir Thomas Strange's *Hindu Law*, 2nd ed., Vol. I, pp. 27, 28, 247, 248; and Mr. Colebrooke's remarks in the second volume of the same work, pp. 19, 402, and 407. “No doubt, the widow may give away her own property, excepting land given to her by her husband, or inherited from him, which she cannot dispose of without consent of the next heirs.”

† 10 S. W. R., P. C., p. 3.

Again, even if the property claimed in the suit were *stridhun* and passed as such, the title of the reversionary heirs would prevail. The devolution of *stridhun*, the Privy Council said, from a childless widow, is regulated by the nature of the marriage. If the widow had been married according to one of the four approved forms, her *stridhun* would, according to the Mitakshara, go to the reversionary heirs of her husband.*

Even if the property so inherited by a woman from a woman was the *stridhun* of the deceased, it will not therefore be the *stridhun* of the heiress. As long ago as 1793, it was decided by the Bengal Sudder Court that, although property which was given to a daughter by her father at her marriage is the *stridhun* of the daughter, and devolves at her death to her daughter, yet such daughter's daughter does not take it in the character of *stridhun*, but as an ordinary inheritance. At her death, her mother's brother or his son is a preferential heir to her own daughter.

Having considered the various rules of law which define and regulate the power of alienation, we now come to the question as to the person in whose favour such a power may be exercised, and, finally, as to the mode in which a valid alienation may be effected.

Alienation
completed
by relin-
quishment
and accept-
ance.

Relinquishment and acceptance together are necessary in order to effect a valid transfer of property.† Srikrishna remarks that mere relinquishment, such as the letting loose of a young bull at a funeral, does not of itself confer a right of ownership. The condition is added that it

* See Mitakshara, Chap. II, Sec. XI, para. 11; 2 Strange's Hindu Law, pp. 411, 412.

† Dayabhaga, Chap. I, verse 21, note.

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II.

must be "in favour of one who is a sentient person." The author of the *Dayabhaga* also says that in the case of donation, the donee's right to the thing arises from the act of the giver,—viz., from his relinquishment in favour of the donee who is a sentient person.

Donee
must be a
sentient
being.

Acceptance or appropriation is said to mean that act of the donee whereby he recognizes the thing given for his own. Jagannatha also says in his Digest,* that a donation consists in relinquishment, vesting property in another after divesting the right of the owner. If the offering be made to inanimate deities after allowing a period for supposed enjoyment of the idol, such as one day and night, it must be given to Brahmanas; and in the case of *Ganendro Mohun Tagore v. Upendro Mohun Tagore*,† we find in the judgment of Sir B. Peacock that, according to Hindu law, the donee must be capable of accepting the gift, and must, like an heir-at-law, be a sentient being. The principle of that law, it was said, requires that property which passes out of one man must immediately vest in another. "I apprehend," said the Chief Justice, "that, according to the general principles of Hindu law, a gift *inter vivos* or by will cannot be made to a person not in existence at the time of the gift; or in the case of a will, at the time of the death of the testator; and that it cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property, by virtue of the gift or devise, ceases to be that of the donor or testator." The idea which runs through that portion of the *Dayabhaga* which treats of the transfer of property, is the two-fold one of constituting the right of one man after annulling the pre-

* Colebrooke's Digest, Book V, Chap. III, verse 163.

† 4 B. L. R., O. C., p. 188.

vious right of another. "Heritage," it is said, "signifies 'what is given,'—that is, wealth which, on the extinction by death of one man's property in it, becomes the property of another. There is therefore nothing to show that, according to Hindu law, after property has ceased by virtue of a gift to be that of the donor, there can be any contingency or uncertainty as to the person in whom it is to vest, or that the property can be so given, whether by will or by alienation *inter vivos*, as to remain in abeyance or *in nubibus* until the donee come into existence. And with regard to immoveable property, there is a text of Yajnavalkya,* which especially enjoins publicity of acceptance,—that is, acceptance in the presence of witnesses. Jagannatha adds that a written contract of gift is proper, and that in the want of that the donation should be attested.† He also says that, 'in the case of gift, acceptance alone generates property. Accordingly an inanimate being can have no property, through the want of the requisite acts, from the effort with which an acquisition originates until final acceptance.'"

Although a person who takes by gift or conveyance must be a sentient being, it must nevertheless be observed that a man who is disqualified from inheriting according to the ancient principles of Hindu law, may nevertheless be capable of taking by purchase. It has been held, for example, that a lunatic may take by conveyance, though not by inheritance.‡

Whether or not according to Hindu law an idol is a "juridical person" capable of holding property and pos-

* Colebrooke's Digest, Book II, Chap. IV, Sec. II, verse 32.

† *Ibid*, Book V, Chap. I, Sec. I, verse 1.

‡ *Goureenath v. Collector of Monghyr*, 7 S. W. R., p. 5.

LECTURE
II.

sessing legal rights is not very well ascertained. One of the Judges of the Bengal High Court* has expressed the opinion that it is very doubtful to say the least of it whether an idol is such a person. "Nothing can be more ill-defined," he says, "than the notions of the writers on Hindu law on this subject of the position of idols." He referred to Jagannatha's Commentary,† where there is the following passage:—"But according to the opinion of those who maintain property vested by mere gift without acceptance, a thing which is given to a deity, whose essence is a text of scripture, becomes the property of that deity. Let it not be asked by way of objection, what is the conclusion of those who maintain the animation of deities, The apparent difficulty is reconciled, although deities, according to this opinion, be animated by not admitting their acceptance of gifts. In like manner insects and the rest have no property in water and other things consecrated for the benefit of all beings."

And clearly
designated.

According to Sir Barnes Peacock's judgment in *Tagore v. Tagore*, "a gift cannot operate to pass property unless the donee is in existence, so that as soon as the property is relinquished and passes out of the donor, it may vest in the donee." Further, "the designation of the donee must be so certain that the latter may be capable of accepting the gift, and that it may be ascertained, immediately the property ceases to be that of the donor, who is the person intended to be benefited, and in whom the property given has vested."

Benamée
transac-
tions valid.

It is not necessary, however, that the person to whom an estate is conveyed should have the beneficial interest in it.

* 4 Beng. Law Rep., O. C. J., *per* Macpherson, J., p. 285.

† Colebrooke's Digest, Book V, Chap. I, Sec. I, Art I.

The system of purchase by one man *benamee* in the name of another is common amongst Hindus, and has been recognized by the highest judicial authority,—viz., the Privy Council. In one case,* although the conveyance was in the English form of lease and release, the Privy Council held that in a purchase of real estate made by a Hindu in the name of one of his sons, the legal presumption was not that it was intended by way of advancement and provision by the father for the son, but that it was a *benamee* purchase, and they accordingly held the son to be a trustee for his father. They cited with approval the statement of law contained at the commencement of Mr. Macnaghten's book:† “The most approved conclusion appears to be that the inchoate right arising from birth and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle,—that is, by the death of the owner, natural or civil, or his voluntary abandonment.” The true character of a *benamee* transaction may always be shown, and the real criterion of ownership is, by whom was the purchase-money paid? ‡

Benamee transactions—that is, purchases made by a man in the names of others—are mentioned as early as the year 1788, in Mr. Justice Hyde's Notes,§ where it is said: “In mere personal demands, such as Bengal bonds, the Courts have upon consideration determined that the action may be

* *Gopeekristo Gosain v. Gungapersad Gosain*, 6 Moore's I. A., p. 53.

† *Principles of Hindu Law*, p. 2.

‡ *Dhurm Panday Doss v. Musst. Shamasoondery Debia*, 3 Moore's I. A., p. 240.

§ *Gopeekristo Gosain v. Gungapersad Gosain*, 6 Moore's I. A., p. 53.

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brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it." And in *Dhurmdass Panday v. Mussamut Shamasoondery Debia*,* the law was recognized by the Privy Council that the criterion in questions of disputed title in India is to consider from what source the money comes from which the purchase-money is paid. The knowledge and assent of the person in whose name the purchase is made are immaterial. If such person is a stranger or only a distant relative, there would of course be a resulting trust. If, however, instead of being a stranger, he were a son of one for whom the purchaser was legally bound to provide, the presumption in English law would be that the purchase was by way of advancement. There is, however, a strong objection against importing into the Hindu law any such rule. Benamsee purchases in the names of children without any intention of advancement are frequent in India and are constantly recognized.

Conditional
alienation.

There is no doubt also that a gift by Hindu law may be made upon condition. In the case of a conditional gift, the right of the donor is not extinguished, nor does that of the donee accrue, unless the condition made be fulfilled.† So also a gift conditioned to take effect after the death of the donor does not go to the heir of the donee, in the absence of express stipulation, if the latter dies before the former. A conditional gift is rendered null and void if the donee dies before the happening of the condition, or if he omits to perform all the conditions stipulated by the donor.‡

* 3 Moore's I. A., p. 229.

† Shama-churn's Vyavastha Darpana, p. 601.

‡ *Ibid*, pp. 606, 607.

And in the case of *Sreemutty Soorjomonee Dossee v. Denobundoo Mullick*,* the Privy Council considered that there was nothing "against public convenience or against the principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England), upon an event which was to happen, if at all, immediately upon the close of a life in being."

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II.

The next question is as to the mode in which a transfer or conveyance may be effected as between Hindus by the Hindu law. The first observation to be made upon this topic is that the Hindu law in no instance requires that a contract or conveyance should be in writing, though it sets upon all occasions a due value upon written evidence.† "It seems," said Sir Colley Scotland,‡ "from *Doe d Seebkristo v. E. I. Company*§ and other authorities, that, under the Hindu law, proof of a verbal grant of land, whether by way of exchange, sale, or gift, is good when followed by possession, and otherwise unobjectionable. Indeed, in no case does Hindu law appear absolutely to require writing, though as evidence it regards and inculcates a writing as of additional force and value."

Form of
alienation.

There can be no question as to the validity of a verbal gift, whether of immoveable or moveable property, by Hindu law. Such gift|| resembles a grant by the English law of chattels, real or personal, before the Statute of

Verbal
transfers
valid.

* 9 Moore's I. A., p. 135.

† 1 Strange's Hindu Law, p. 277.

‡ *Mantena Raya Paraj v. Chebun Venkataraj*, 1 Mad. H. C. Rep., p. 100.

§ 6 Moore's I. A., p. 267.

|| *Doe d Rajah Seebkristo and others v. E. I. Company*, 6 Moore's I. A., p. 267.

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II.

Frauds which then might as to both have been without writing or deed. But possession must follow or accompany a gift, though a sale will be held valid without it, probably because the consideration having passed from the purchaser, the property has at the same time passed from the vendor. There are two cases in which the Bombay High Court has held that by Hindu law a sale of immoveable property is valid though not followed by possession,—viz., the cases of *Nagubai v. Motigir Guru and others*,* and of *Bhukan Bhaibava v. Bhaji Prag*.†

Quære,
whether
they must
be followed
by possession.

But in another case, where the plaintiff ‡ sued in ejectment and produced a deed of gift in support of his title, it appeared that the tenant had cultivated the land for more than thirty years, and had not paid rent since the date of the deed of gift. The question was raised whether, by the Hindu law, the gift of land is complete without delivery to or possession by the donee. It was held that it was not complete unless it was followed by possession or receipt of rent by the person who claimed under the gift.

The Sudder Court of Bengal has ruled that the effect of the execution of a bill of sale by a Hindu vendor is to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses.

The Privy Council, when the case§ came before them, remarked that it was extremely questionable whether such

* 1 Bom. H. C. Rep., A. C. J., p. 5 (2nd edition).

† *Ibid*, p. 19.

‡ *Hajivan Anandram v. Naran Haribhai*, 4 Bom. H. C. Rep., A. C. J., p. 31.

§ *Rajah Sahib Prahlad Sen v. Baboo Budhu Sing*, 2 B. L. R., P. C., p. 111.

a conclusion was warranted. They pointed out that, to support it, the execution of the bill of sale must be treated as a constructive transfer of possession. It must be treated as a contract to be performed *in futuro*, which may or may not be decreed to be specifically performed.

The evidence upon which a verbal gift or transfer is supported would of course be most narrowly watched, for as a matter of fact such a transaction is usually accompanied by a writing even amongst the most illiterate classes.

As respects such writings, whether deeds of conveyance or contracts, when they are produced, the rule of law is that they ought to be most liberally construed. “The form of expression, the literal sense, is not so much to be regarded, as the real meaning of the parties which the transaction discloses.”*

Construc-
tion of
deeds.

For instance, no words of inheritance are necessary in a deed of conveyance in order to continue to a Hindu's heirs the interest which he takes under it in the estate conveyed.†

It is scarce necessary to add that if a Hindu makes a deed of gift in favour of three donees jointly, the true construction of such deed is that the shares of the joint donees are equal.‡

Contrary, however, to the ordinary rule of law that a man's signature by way of attestation to the due execution of a deed does not fix him with a knowledge of its contents, it has been held, and is now established law, that the attes-

Proof of
them.

* Hunooman Persad Panday v. Mussamut Babooji Munraj Koonwaree, 6 Moore's I. A., p. 411.

† Anundmoye Dossee v. John Doe & E. I. Company, 4 S. W. R., P. C., p. 51; and 8 Moore's I. A., p. 43.

‡ Baboo Sheo Manooq Singh v. Baboo Ram Prakas Singh, 5 S. D. R., p. 148.

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tation by a reversioner of the execution by a Hindu widow of a deed alienating any portion of her husband's property, not merely fixes him with a knowledge of its contents, but shows an acquiescence on his part in her alienation, and he will not be afterwards allowed to impeach it on the ground of waste.* The rule would seem to rest upon the principle that the fact of a conveyance of any sort being made by such a person is quite sufficient to put a reversioner on enquiry and on his guard, and that if he not merely abstains from enquiry but lends his name to the transaction, it would be opening the door to serious frauds to allow him afterwards to plead his ignorance of its true nature and effect.

Consideration.

It is the established practice of the Courts in India in cases of contract to require satisfactory proof that consideration has been actually received according to the terms of the contract. It has never been held that a contract made under seal of itself imports that there has been a sufficient consideration for the agreement.†

Voluntary transfers.

As respects the validity of voluntary transfers, the observations of the High Court of Madras may be quoted. They were made in a suit‡ brought by a judgment-creditor to invalidate a voluntary transfer of moveable property made by the judgment-debtor to his wife. The High Court said, "According to the Hindu law, the possessor of property, whether moveable or immoveable, may make as effectual a transfer of his right and interest by a gift as by a sale or other disposition. It makes no distinction that we know

* *G. C. Manna v. Gourmonee Dossee*, 6 S. W. R., p. 52.

† *Rajah Sahib Prahlad Sen v. Baboo Budhu Singh*, 2 B. L. R., P. C., p. 111.

‡ *Guana Bhai v. Srinivasa Pillai*, 4 Mad. H. C. Rep., p. 84.

of, in favour of creditors between a voluntary transfer and one for valuable consideration. In truth, the Hindu law does not, we believe, contain any special prohibitory provision relating to the protection of creditors generally." But the principles laid down in the English decisions relating to conveyances fraudulent as against creditors will guide the consideration of cases between Hindus.

Again, in a suit* for specific performance of an agreement whereby the defendant agreed to purchase some immoveable property in Bombay, the defence was that the plaintiff had not shown such a title as he was bound to show by the contract. The plaintiff's title began with a bill of sale dated nine years before the date of the agreement. English law gives to the purchaser of land a right to have a good title to it shown by the vendor, and any agreement in restraint of this implied right must be clear and unambiguous. In Hindu law it was held by the High Court of Bombay that no such rule exists, and the intention of the parties with regard to the title to be shown must be ascertained from the terms of their agreement, without having regard to any implication. When a vendor sues for specific performance of a contract, the purchaser is entitled to an enquiry as to the vendor's title; but in considering the nature and extent of the enquiry which should be made, the Courts must have regard to the usage of the place, the manner in, and titles by, which land is held, the law of limitation, and the modes of transfer which have been in use, as well as any other circumstances which can fairly be considered to have been within the knowledge and contemplation of the parties when the agreement for

Vendor's
duty to
make his
title.

* *Devsai Ghela v. Jivaraj Mukundas*, 2 Bom. H. C. Rep., p. 430.

LECTURE
II.Miscella-
neous.

sale was made. The actual decision in the case was founded upon the particular agreement made.

In a case* tried in the High Court of Bengal, it appeared that certain Government promissory notes had been given and delivered to the plaintiff by his father only two or three days before his death, at a time when he was in possession of his faculties and capable of making a gift. On being asked to endorse the notes, he said, "As soon as I get a little better I will sign them. What cause have you for being anxious, seeing that I have given them in the presence of two respectable witnesses?" The Chief Justice (Sir Barnes Peacock) considered that the gift was intended to take effect immediately and not after death, and that it was valid; and that the debt and interest secured by the Government notes and not the mere papers were given. He considered that though there might not have been such a complete transfer of the debt as to enable the donee without some further act to enforce the securities against Government in his own name, it was clear that the donor, if he had lived, or his representatives after his death, could not at law have compelled the plaintiff to return the Government papers. Mr. Justice Macpherson considered that what occurred amounted to a nuncupative will. Mr. Justice Phear considered that what occurred established a good *donatio mortis causa*; that there was a clear intention to give, the donor merely abstaining through weakness from making the endorsement.

In another case† tried by the same Court, the plaintiff was a co-sharer in certain immoveable property. Some ten

* Kumara Upendra Krishna Deb Bahadur v. Nobin Krishna Bose, 3 B. L. R., O. C., p. 113.

† Jagannath Pal v. Bidyanand, 1 B. L. R., A. C., p. 114.

or fourteen years before the institution of the suit, he became a *bairagi*, and, as he says "relinquished the world," or *sanshar*, and set out on a pilgrimage to various places sacred amongst the Hindus. Previous to his departure he made over his share to the care of his nephew, conditionally that on his return the share should be restored to him. During his absence the nephew sold it to the defendant. The Moonsiff held that the plaintiff was entitled to recover. The Judge on appeal held that as a professed *bairagi* he was thereby civilly dead, and that his nephew as his heir had granted a valid title to the defendant. The High Court considered it indisputable that a Hindu becoming a *bairagi*, if he chooses to retain possession of, or to assert his title to, property to which he is entitled, does an act which may be morally wrong, but in which he will not be restrained by the Courts.

LECTURE III.

PARTITION.

Partition—Period of partition—Status of parcenership—Imposed by law—Not by agreement of the parties—Things impartible—Raj—Polliam—Self-acquisitions—Buildings constructed by one member on the joint estate—The self-acquisitions must be made without use of joint estate—Gains of science impartible—Unless joint property has been employed—The Mitakshara on things impartible—The Dayabhaga on the same subject—Mode of partition—According to the Dayabhaga—According to the Mitakshara—According to the Vyavahara Mayukha—According to the Vivada Chintamani—Rulings of Bengal High Court—Of Agra Sudder Court—*Appooier v. Ramasubha Aiyar*—Subsequent decision of Bengal High Court—Miscellaneous.

Partition. I HAVE already referred to the joint estate, as it is understood by the authors of the Mitakshara and the Dayabhaga, and also to the conflicting theories which they propound relatively to the effect of partition as the source of proprietary right. But the subject of partition, like that of alienation, must be pursued at greater length, for it forms a separate branch of Hindu jurisprudence, and the rules of law relating to it are of considerable practical importance.

Partition (*vibhāga*), according to the Mitakshara, is the adjustment of divers rights regarding the whole joint estate by distributing them over particular portions of it; and, on the other hand, reunion is the divesting of exclusive rights in these particular portions and re-vesting a common right over the whole. That treatise contemplates a divi-

sion or reunion of title, while the Dayabhaga treats the title as always divided, and regards the thing which is the subject of property as alone divisible by the act of the parties.

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III.

There are theoretically three periods of partition according to the Mitakshara: the first being at the option of the father; the second at the option of the sons in his life-time, if there be no prospect of further issue, either on account of the father's age or on account of the age of both parents; thirdly, which is the most usual period for it to take place, after the decease of the father.

Period of
partition.

According to the Dayabhaga, the power of the sons to partition only arises on the extinction of the father's ownership. There are therefore only two periods of partition recognized by that treatise: one, when the father's property having ceased each son can demand partition; the other, when the father still retains the proprietary right, but nevertheless chooses to divide his property amongst his sons. As he is absolutely entitled, it is now the established law that he may divide it as he pleases, the legal power of alienation being entirely unfettered in its exercise by the moral prohibitions, which are so frequently reiterated. It is further insisted in the Dayabhaga that the sons should not partition the ancestral estate until after the death of both parents. But this rule is not observed in practice; the mother, however, on a partition by her sons, taking a share equal to that of a son, but having no right herself to call for a division of the estate. Vyasa also says,—“For brethren a common abode is ordained, so long as both parents live; but after their decease, religious merits of separated brethren increase.”*

* Dayabhaga, Chap. III, Sec. I, verse 8.

LECTURE
III.Status of
parcener-
ship.

Until partition, the descendants of a common ancestor are possessed of the rights and obligations which grow out of the *status* of an undivided family as defined by Hindu law. Their exclusion from those rights is not necessarily governed by the same law which regulates their exclusion from inheritance. Heirship is governed by the law of the ancestor without regard to the law of the heir; but parcenership must be dealt with in reference to the law of the parcener. For instance, a Hindu who is an outcast, or who has renounced the Hindu religion, or who has become a convert to Christianity, whatever may be his rights of inheritance, having regard to the operation of Act XXI of 1850, and the Regulations which deal with that subject, is at once severed from the Hindu family and deprived of his right to retain the *status* of co-parcenership. The tie* which binds the family together is, so far as he is concerned, not only loosened, but dissolved. The obligation consequent upon and connected with the tie must be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must equally be put an end to by a severance which the Hindu law recognizes and creates.

Imposed by
law.

Such was the doctrine of the Privy Council in the celebrated case of *Abraham v. Abraham*.† The *status* of parcenership which devolves on a Hindu at birth, and is created by operation of law, considerably influences while it continues his rights and duties; and under the Mitakshara system, the rules of succession by which his property is affected. Such legal *status* is wholly different from that which is effected by agreement of parties to

* *Abraham v. Abraham*, 9 Moore's I. A., p. 195.

† 9 Moore's I. A., p. 195.

live or hold property jointly. It is at once determined by the happening of an event which, like that of conversion of one or more of the parceners, is legally inconsistent with its continuance, and operates to sever the relationship in person and property which law originally imposed.

In a case* which came before the Sudder Court of Madras, and subsequently before the Privy Council, the illegitimate children of an Englishman by two Hindu women were held by the Privy Council to have been rightly considered to be Hindus. They were brought up as Hindus and lived at first as a united family. One of them obtained a decree for partition. A deed of compromise was subsequently made with the object of securing the continuance of joint management. The deed was held by the Privy Council to affect the mode of enjoyment, but not the right of property, except so far as it contained provisions against alienation. "The sons who thus agreed to become united were not a joint Hindu family in the ordinary sense of the term,—a family of which the father was in his life-time the head, and the sons in a sense parceners in birth by an inchoate though alterable title; but they were sons of a Christian father by different Hindu mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindu joint family. On the death of each, his lineal heirs, representing their parent, would by the effect of the agreement, enter into that partnership; collaterals, however, could not so enter by succession, unless the Hindu law gave in the case under consideration a right of inheritance also to collaterals. The parties could not by their agree-

LECTURE
III.

Not by
agreement
of the
parties.

* *Myna Boyee v. Ootoram*, 8 Moore's I. A., p. 400; S. C., 2 W. R., P. C., p. 4.

LECTURE
III.
—

ment give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindus, would come in only on failure of the heirs."

Things
impartible.

Although by Hindu law, as understood in all the schools, the wealth of the father becomes, at least at his death, divisible amongst all his sons, yet there are exceptions to the rule, some properties being regarded as in their nature or on the ground of long usage impartible, and others being reserved exclusively to one co-parcener by the title of exclusive acquisition. To the former class belong principalities and extensive zemindaries in the case of great families, when it is shown that the usage has prevailed for a very long series of years, sufficient to control the general law of inheritance.

Raj.

With respect to a raj as a principality, the general rule is that it is impartible.* It is a sovereignty, a principality, subordinate no doubt, but still a limited sovereignty and principality, which in its very nature excludes the idea of division amongst the sons.

In the case of *Baboo Teluckdharee Sahie v. Maharajah Rajendur Protap Sahie*,† the High Court of Bengal said "we do not find that it is anywhere definitely laid down what a raj is. There are many decisions in which estates have been found to be raj or principalities, but what exactly constitutes a raj has not, so far as we are aware, been anywhere set forth." Mr. Justice Levinge defined it to be "a principality which by universal custom must be preserved entire. The succession must be single, and

* *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh*, 6 Moore's I. A., p. 187.

† *Sutherland's F. B. Rulings*, p. 97.

whatever family usage governs it must continue to prevail. Upon a permanent breach of any of these particulars, the raj would become extinct." The Court added: "We will not go the length of saying that, under no circumstances, can property which constitutes a raj be divided, for it may pass into the hands of strangers, say in right of purchase at public auction for arrears of Government revenue, and it is impossible to hold that the purchaser, whoever he may be, has no power of making any disposition of the property, but that his first born has, in right of birth, an indefeasible title to the whole and entire estate. We do think, however, that while the estate remains in the same family having come down from father to son, or to some other single member, the rule of impartibility must prevail."

Again a Polliam* is a tract of country subject to a petty Polliam. chieftain. It is in the nature of a raj. It may belong to an undivided family, but it is not the subject of partition. It can be held by only one member of the family at a time who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

Next with regard to the exclusive title of each co-parcener to his own acquisitions, and his right to except them from the operation of a general division, it was determined, as far back as 1805, by the Bengal Sudder Court,† that a member of an undivided Hindu family need not, even according to Hindu law prevalent in the province of Benares, share with the other members of the family his own separate acquisitions, made without aid from the joint stock of the undivided family.

* *Naragunty Lutchmeedavamah v. Vengama Naidoo*, 9 Moore's I. A., p. 85; S. C., 1 W. R., P. C., p. 30.

† *Soobuns Loll v. Hurbuns Loll*, 1 Sel. Rep. (new edition), p. 121.

LECTURE
III.

Again in 1807, the Pundits of the Bengal Sudder Court* pronounced the law to be as follows :

“Of several brothers living together in family partnership, should one acquire property by means of funds common to the whole, the property so acquired belongs jointly to all the brothers. Should, however, the means of acquisition drawn from the joint funds be of little consideration, and the personal exertion considerable, two shares belong to the acquirer and one share to each of the other brothers ; but should property be acquired by one brother without the assistance of any joint funds, it belongs exclusively to the acquirer.”

Buildings
constructed
by one
member on
the joint
estate.

The impartibility of property self-acquired by one of the members of an undivided family is so explicitly recognized by the older authorities that no doubt could ever have rested upon the doctrine so established. Even a building erected on the joint estate by one member at his own expense remains his separate acquisition, and is not divisible. “A house, garden, or the like,” says the author of the *Dayabhaga*,† “which one of the co-heirs has constructed within the site of the dwelling-place during the father’s life-time, remains his indivisible property, for his father has assented by not forbidding the construction of it.” In a very old case,‡ it was decided that an acquisition known to be separately acquired cannot, under any circumstances, be claimed by the joint family. That was in 1801, and the Pundits further declared it to be recognized law that where one member of the joint family has built a brick house on

* *Purtab Bahadur Sing v. Tillukdaree Sing*, 1 Sel. Rep. (new edition), p. 236.

† *Dayabhaga*, Chap. II, Sec. VI, verse 30.

‡ *Khodeeram Surma v. Trilochun*, 1 Select Reports (new edition), p. 46.

ancestral land with separate funds of his own, even in that case such house would not be a property in which the other members of the family would have any right. Co-parceners in land, they said, would only have a claim on him for other similar land equal to their respective shares. Such, they said, was the custom or unwritten law.

The Bombay High Court* adopted the same doctrine, and ordered a Hindu, who had built a house at his own expense, though with borrowed money, on the family property, to make over to each of his co-parceners, not a share of the house and land equal to his own, but a share of the house and land (*i. e.*, the site on which the house was built) equal in value to the share which such co-parcener would have taken in the land alone.

But although self-acquired property belongs exclusively to the acquirer, it must be gained without use of or detriment to the joint estate; otherwise it will be regarded as an accretion to the joint property, and become the subject of partition. That is invariably the case as between co-parceners. Whatever is acquired at the charge of the patrimony is subject to partition.† “Where a co-parcener, with comparatively small detriment to the joint estate, acquires any separate property by his own labour or capital, the property is nevertheless to be considered as joint, although the acquirer gets a double share.”‡ An attempt, however, was made to except, from the character of joint estate, property which had been acquired by a father under Mitakshara law with the proceeds of the ancestral estate.

The self-acquisitions must be made without use of joint estate.

* *Vithoba Bava v. Huriba Bava*, 6 Bombay H. C. Rep., A. C. J., p. 54; and see 2 Macnaghten, p. 152.

† Mitakshara, Chap. I, Sec. IV, verse 29.

‡ *Shibdyal Tewaree v. Bishonath Tewaree*, 9 S. W. R., p. 61.

LECTURE
III.

It was admitted that all acquisitions made out of the profits of the joint property by the manager of a joint undivided family composed of brothers belong to the joint estate. It was, however, held by the Bengal High Court* that as the father and sons were co-owners in the ancestral property, so they were co-owners in that which issued from it,—viz., the profits of that joint estate,—and that consequently any estate purchased by those joint funds followed the character of the fund of which it was the representative.

Gains of
science
impartible.

The gains of science are also excluded from partibility. In the *Mitakshara*† it is said, “He need not give up to the co-heirs what has been gained by him through science; the acquirer shall retain such gains.” And again, *Nareda*‡ says, “He who maintains the family of a brother studying science, shall take, be he ever so ignorant, a share of the wealth gained by science.” *Katayana*§ adds, “Wealth acquired through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition

Unless joint
property
has been
employed.

through learning.” In the *Dayabhaga*,§ too, it is stated that “partition does or does not take place in the case of wealth acquired by science, according as joint property is or is not employed.” The rule of law, therefore, is that the ordinary gains of learning or science which have been taught at the expense of the family fund, are subject to partition. In case of the *Chalakonda Alasani v. Chalakonda Ratnachalan*,|| the High Court of Madras

* *Shudanund Mohapattur v. Bonomallee Doss Mohapattur*, 6 S. W. R., p. 256.

† *Mitakshara*, Chap. I, Sec. IV, verse 6

‡ *Ibid*, verse 8.

§ *Dayabhaga*, Chap. VI, Sec. I, verse 21.

|| 2 Madras High Court Reports, p. 66.

held that the gains of prostitution, as the gains of a trade recognized and legalized by Hindu law are partible,* if the science has been imparted at the family expense to a member of the family receiving a family maintenance, but impartible when the science has been imparted at the expense of persons not members of the learner's family. The High Court of Bombay† expressed its concurrence in this decision, and also held that "gains of science imparted at the family expense and acquired whilst receiving a family maintenance are partible."

Under the Hindu law places of worship and sacrifice are also impartible.‡ To divide buildings used for those purposes would be to render them utterly unsuited for the purposes and objects for which they are intended. Such buildings are always left joint, when a partition is made by a Collector under the provision of Regulation XIX of 1814. Parties jointly entitled to the use of such buildings "can enjoy their turn of worship, unless they can agree to a joint worship, and any infringement of the right to a turn in the worship can be redressed by a suit." "We cannot," said the High Court of Bengal, "permit the object for which they were erected to be neutralized by dividing them." Dewutter lands also are impartible. Those for whose benefit they are dedicated can by consent form separate religious establishments, and assign to each a *palla* or turn of worship.§

* The Hindu law, however, upon this subject, must be held to be modified by the Penal Code, and the trade of prostitution will only be legal so far as it does not violate the provisions of sections 372 and 373 of that Code.

† *Bai Manchha v. Narotamdas Kashidas*, 6 Bombay Reports, A. C. J., p. 1.

‡ *Anundmoye Chowdhraïn v. Boykantnath Roy*, 8 S. W. R., p. 193.

§ See Vol. I, p. 69.

LECTURE
III.

The
Mitakshara
on things
impartible.

With regard to effects which are not liable to partition the author of the Mitakshara quotes the text of Yajnyavalkya.* “Whatever else is acquired by the co-parcener himself without detriment to the father’s estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs, nor shall he who recovers hereditary property which had been taken away give it up to the parceners, nor what has been gained by science.”

Again,† the ornaments and clothes worn by each person are exclusively his, but what has not been used is common and liable to partition.

Again,‡ what is obtained through the father’s favour is exempt from partition according to a text of Yajnyavalkya: “Effects which have been given by the father, or by the mother belong to him on whom they were bestowed.”§ The rule obtains whether the gift is made before or after the separation of the parents from their children.

Self-acquired property is exempt from partition, provided it be acquired without detriment to, or use of the joint estate. So also articles of personal use and things which are in their nature indivisible, such as a common road, are exempted. According to Vasistha, he amongst co-parceners who has made an acquisition at the charge of the joint property, may take a double portion of it; unless the common stock be improved, in which case an equal partition is ordained. Yajnyavalkya does not seem to approve of this distinction.||

The
Dayabhaga
on the same
subject.

Jimutavahana treats in the sixth chapter of the Dayabhaga upon the subject of impartibility. He first says that that

* Mitakshara, Chap. I, Sec. IV, verse 1.

† Chap. I, Sec. IV, verse 19.

‡ Chap. I, Sec. IV, verse 28.

§ Chap. I, Sec. VI, verse 13.

|| See Mitakshara, Chap. I, Sec. IV, verses 29 and 31.

which is the subject of partition, is according to the text of Katyayana, "what belonged to the paternal grandfather, or to the father, and anything else appertaining to the co-heirs having been acquired by themselves."* Menu and Vishnu declare indivisible what is gained without expenditure,—that is, without using the common property. Separate acquisitions were therefore from the earliest date exempted from partition. Effects gained by the use of the common goods are expressly directed to be divided.†

LECTURE
III.

It is stated to be an uncontested rule ‡ that an acquirer as such should have two shares of wealth gained by the use of joint funds.

Jimutavahana then proceeds to define the various sorts of acquisitions which are exempt from partition: (1) The gains of science obtained from displaying and making known one's own knowledge; (2) gains of valour; (3) wealth received on account of marriage at the time of accepting a bride; (4) items of property required for personal use. Again,§ "A house, garden or the like, which one of the co-heirs had constructed within sight of the dwelling-place during his father's life-time remains his indivisible property, for his father has assented by not forbidding the construction of it." Further Menu ordains || "If a father recover the property of his father which remained unrecovered, he shall not against his will share it with the sons, since in fact it was acquired by himself." At his death, however, without making any disposition of it, his sons would succeed equally. Recovered hereditary

* Chap. VI, Sec. I, verse 3.

† *Ibid*, verse 14.

‡ *Ibid*, verse 28.

§ *Ibid*, Sec. XI, verse 30.

|| 9 Menu, 209.

LECTURE
III.

property therefore stands upon the same footing as self-acquired property, except in the case of land, in regard to which* Sancha says that, if a single heir recovers it solely by his own labour, the rest may divide according to their due allotments, having first given him one-fourth part.

Mode of
partition.

The next branch of the subject,—*viz.*, the process by which partition is effected, that is, the mode in which joint property is converted into separate property, requires some explanation, so far at least as the Mitakshara law is concerned. According to the Dayabhaga† a co-parcener has only a proprietary right in his share, not in the whole estate. The title is always regarded as distinct or divided though the property is joint. Partition, therefore, according to the Bengal school, simply consists in determining or distributively adjusting proprietary rights which exist in lands and chattels, but which extend only to portions thereof respectively, which portions are not, however, distinctly ascertained and exclusively appropriated. The *status* of an undivided family may cease long before the portions of property have been exclusively appropriated, among its members.

According
to the
Daya-
bhaga.

“Partition,” according to the Dayabhaga, “consists in manifesting or in particularizing by casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence for any ground of discrimination existed. Or partition is a special ascertainment of property, or making of it known by reference of a particular share to a particular person.”

* Dayabhaga, Sec. II, verse 38.

† See Dayabhaga, Chap. I, Sec. VIII and IX.

So also Raghunandana.* “But, in fact, partition is a distributive adjustment by lot or otherwise of the property of relatives vested in them over the whole wealth, in right of the same relation on the extinction of the former owner’s property. The vesting and divesting of property over the whole estate are inferred in like manner as the divesting of partial rights over portions, and vesting a common right over all, are deduced in the instance of re-union of co-heirs.”

LECTURE
III.

Under Mitakshara law, however, the consequences which flow from the *status* of an undivided family are far more serious than under the Bengal school. And it has been distinctly held by the Privy Council, as well as the Courts in India, that division of title once made, without a division of the subject to which the title applies, is sufficient to take away from the subject, whose title is divided, the character of joint estate. In other words the actual allotment of specific shares though necessary to separate enjoyment, is not essential to the completeness of a partition, and of the legal consequences which ensue from separation with regard to the relative rights and duties of the members of the family.

According
to the
Mitak-
shara.

Although separate possession and separate enjoyment are mentioned in the following passages of the Mitakshara, the Vyavahara Mayukha and the Vivada Chintamani as the criteria of partition, they are not the sole evidence of it. Those† passages are.

Mitakshara.‡ When partition is denied the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses and by written proof and by separate possession of house and field.

* See note to Dayabhaga, Chap. I, Sec. VIII.

† See 6 S. W. R., p. 140.

‡ See Chap. II, Sec. XII, verses 1, 2, 3.

LECTURE
III.

If partition be denied or disputed, the fact may be known and certainty be obtained by the testimony of kinsmen, relatives of the father or of the mother, such as maternal uncles and the rest, being competent witnesses as before described.

Or by the evidence of a writing, or record of the partition. It may also be ascertained by separate or unmixed house and field.

The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments, and other religious duties performed separately from them are pronounced by Nareda to be tokens of a partition. 'If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partition indeed has been made, religious duties become separate—for each of them.'

Vyavahara Mayukha.

According
to the
Vyavahara
Mayukha.

Even when there* is a total failure of common property, a partition may also then be made by the mere declaration, 'I am separate from thee.' A partition may be even a mere mental distinction. This exposition clearly distinguishes the various qualities of this term.

Yajnavalkya states† the modes of decision in case of denial of partition made by any one. 'When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof or by house and field separately possessed.'

* See Vyavahara Mayukha, Chap. IV, Sec. III, verse 2.

† *Ibid*, Chap. IV, Sec. VII, verse 27.

Nareda is quoted* to the same effect as in the Mitakshara and then† declares other signs also of partition. Separated, but not unseparated, brethren may reciprocally bear witness, become sureties, bestow gifts, and accept presents. Gift and acceptance; cattle, grain, house, land, and attendants must be considered as distinct among separated brethren, as also the rules of gift, income, and expenditure. Those by whom such matters are publicly transacted with their co-heirs may be known to be separate even without written evidence. * * * *

Brihaspati says,—‘They who have their income, expenditure, and wealth distinct, and have mutual transactions of trading and traffic, are undoubtedly separate.’

Vivada Chintamani:‡—‘Nareda says, if there be any doubt with regard to partition among co-heirs it may be removed by kinsmen who are the witnesses to it, by the partition deed, and by distinct income and expenditure, and so forth. When the brothers live together, only one of each set of religious ceremonies is performed by all of them; but after partition they separately celebrate religious rites. Divided partners give or receive things in mortgage, separately perform ceremonies every new moon, and so forth, and contract, or give loans without consulting each other. Divided brothers can be witnesses to the concerns of each other, can be sureties for each other, can make or receive presents; but undivided ones cannot do so. Those who perform the above-mentioned deeds out of their own stock shall be known as separated, even if there be no partition deed.

According
to the
Vivada
Chinta-
moni.

* See Vyavahara Mayukha, Chap. IV, Sec. VII, verse 28.

† *Ibid*, verse 34.

‡ See *Vivada Chintamani*, by Prosonno Coomar Tagore, p. 310.

LECTURE
III.

When one becomes a witness, and another contracts a debt or becomes surety, when one grants and another receives a loan, they are known to be separated.

The purport of the above is that the aforesaid transactions cannot take place without partition. Therefore partition will be determined by them.

According, therefore, to all the schools which recognize a joint title as well as a joint enjoyment, a severance is effected by express agreement between the parties, or by such acts of separate ownership as are inconsistent with continued unity of right and possession. When that unity is destroyed, the family ceases to be joint in estate, even though it still remains to be ascertained to what specific portion of property the separate title of each member attaches.

The text, moreover, of Yajnyavalkya* is as follows: "A partition being denied, let the truth of it be ascertained by the evidence first of near kinsmen, then of relations, more distant; then of witnesses who are connected with the parties; then by written proof, or separate acts of ownership in house or field."

Rulings of
Bengal
High
Court.

It does not follow from the above passages, nor has it ever been held by the Bengal Sudder and High Courts that an actual division and allotment of proceeds to be held by each parcener is necessary to constitute partition under Mitakshara law; although the Sudder Courts of Madras and Agra are said to have favored that view, on the ground that such a rule was safe and clear. The subject, however, has been at length finally decided. In the first place, there is a decision of the High Court of Bengal in a case†

* See Colebrooke's Digest, Book V, Chap. VI, para. 385.

† *Mussamut Jusoda Koonwar v. Gowrie Byjonath Sohae Sing*, 6 S. W. R., p. 139.

where it was contended that no agreement to be separate in all respects could possibly amount to a partition, according to the school of Benares, in the absence of the separate allotment of property in severalty. The Court, after an elaborate review of the authorities upon the subject, said "A legal partition is proved if it be found that the parties have separated in food and residence; that there has been a distinct separation in estate, indicated by separate enjoyment and separate liabilities, and that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still joint; if in short, looking at all the circumstances, it is clear that the parties really did intend to hold and did in fact hold their shares respectively, each freed from any interest therein of any other sharer, and if the separate enjoyment was not merely a matter of arrangement for the private convenience of the family."

There have been some rulings of the *Agra Sudder Court* Of Agra Sudder Court. to the effect that in a family governed by Mitakshara law, in order to entitle a female to succeed, there must be a regular separation and division of lands, and not simply a division of title and proceeds. But such rule is not recognized by the High Court of Bengal.*

And again in the case of *Appoovier v. Ramasubha Aiyan*† Appoovier v. Ramasubha Aiyan. decided by the Privy Council, the appellant contended that certain property continued to be the undivided property of a Hindu family, notwithstanding that a certain deed of division had been executed. It was contended that a deed of that kind which speaks of a division having been agreed

* See *Lalla Sreepersad v. Mussamut Akoonjoo Koonwar*, 7 S. W. R., p. 488.

† 8 S. W. R., P. C., p. 1.

LECTURE
III.

upon, to be thereafter made is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. But the Privy Council held that no such doctrine had ever been established, and that it involved the error of confounding division of title with division of the subject to which the title is applied.

The appellant admitted that the deed was operative with regard to a certain number of villages, part of the family estate, because he said those had been actually divided; but he contended that it was not a deed which made the family a divided family with regard to the rest of the villages, because it had not been followed by actual partition. In reference to this contention the Privy Council remarked that it was necessary to bear in mind the twofold application of the word "division." There may be a division of right, and there may be a division of property. The effect of the execution of the instrument was to divide the right in the whole property, although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition. Such a division of right was, using the language of the English law, merely by way of illustration, a severance of the joint tenancy and a conversion of it into a tenancy in common. The produce was no longer to be brought to the common chest as representing the income of an undivided property, but the proceeds were to be enjoyed in certain distinct equal shares by the members of the family who thenceforth became entitled to those definite shares. Although no actual *de facto* partition took place, the deed operated in law as a conversion of the

character of the property, and an alteration of the title of the family, converting it from a joint to separate ownership. LECTURE
III.
—

In the case of *Shib Dyal Tewaree v. Bishanath Tewaree*,* the question was whether a partition had been so completely effected between sons as that the share of the mother, which she would take on partition, had vested in her. The lower Court had declared that she was separately entitled to a share. She died after it had been so decided, pending an appeal. When the case came before the High Court of Bengal, they said that she could not be recognized as owner of it at the time of her death. There had not been a final definition of her share, nor had she had any separate enjoyment. Subsequent
decision of
Bengal
High Court.

Partition, they said, is the sole cause of her right to the property. Until the partition has been actually effected, she has no right in the estate except a right of maintenance.

Although division by metes and bounds has been ruled by the Privy Council as not at all necessary to constitute partition under the Mitakshara, two things at least are indispensable: first, the shares must be defined; and secondly, there must be distinct and independent enjoyment of those shares. In other words, there must be a division of title and proceeds, but not necessarily of the *corpus* of the estate. It appeared that in the life-time of the mother a decree of the Principal Sudder Ameen had defined the shares to which the parties were entitled, including that of the mother. Pending the appeal to the High Court, the mother died, and no distinct and independent enjoyment of the shares had taken place. The High Court held that no partition had taken place; that the decree of the Principal Sudder Ameen defining the shares was not final; that the ques-

* 9 S. W. R., p. 61.

LECTURE
III.

tion of shares was still a matter of determination; that it was still open to the sons and grandsons to agree to live jointly; that until the partition took place, and therefore at her death, the mother or grandmother had her right to maintenance, and no title to a share had accrued, and that the family estate, therefore, must be divided amongst the other parties to the suit.

This judgment of the High Court proceeds upon the ground that the decree of the Principal Sudder Ameen effected no division of title, and assuming that to be the case, or that, under all the circumstances appearing in the course of the litigation, the title remained undivided, then no doubt the decision would accord with that of the Privy Council.

Miscellaneous.

Evidence of division of proceeds is generally regarded as essential to the complete proof of the transaction, especially when any doubt is raised. But if it appears that the title has been completely severed by a binding agreement, it could hardly be said that such agreement is entirely inoperative until it be shown that it has been acted upon. In the case of *Bulakee Lall v. Mussamut Indurputtee Kowar*,* decided previously to the last cited case, it was held that any act or declaration showing an unequivocal intention on the part of any shareholder to hold or enjoy his own share separately and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition.

In another case,† where one of the co-parceners was a minor, for whom the Collector had appointed a manager,

* 3 S. W. R., p. 41.

† *Mussamut Deo Bunsee Koer v. Dwarkanath and others*, 10 S. W. R., p. 273.

it was held that a valid and binding separation between the minor and the other branch of the family had been caused by the mode in which the shares respectively belonging to them had been dealt with since the manager was appointed. From that date there had been a separate appropriation, as well as a separate holding and enjoyment of distinct shares; and that, following the judgment of the Privy Council, was held to be all that was necessary to constitute a legal partition according to the Benares school of law. It was considered to be wholly immaterial that the nephew was incompetent by reason of his minority to exercise his own discretion in the matter.

It appeared that from the appointment of the manager the minor's estate was managed without any reference to the interests or wishes of the other co-parceners. Servants were appointed for its management without their sanction. The receipts and disbursements and the profits and losses of the one had nothing to do with those of the other. There was nothing common between them, and there being neither unity of title, nor unity of possession, the estate could no longer be regarded as joint between them. Although this effect of the appointment of a manager by the Civil Court might never have been intended, it was nevertheless held to be its inevitable result.

LECTURE IV.

PARTITION.

The right to partition—According to the Dayabhaga—According to the Mitakshara—Right of the son to partition—Rulings at Bombay—At the other Presidencies—Effect of minority of some of the co-parceners—Agreement restraint of partition—Apportionment of shares—Equality of division—Sons—Daughters—Brethren—Mothers—Sons by different wives—Equal division of acquired property—Unequal Division—Division of son's acquisition—Of mother's separate property—Rights of the son born after partition—Both under the Mitakshara and Dayabhaga—Madras ruling—Recovered property—Effect of partition—Under Mitakshara law—According to the Dayabhaga—Distinction between settlement and partition—Partition by widows—Reunion—Limitation of the right to effect reunion—Mitakshara—Dayabhaga—Daya-Krama Sangraha—Mithila doctrine—Vyavahara Mayukha—High Court of Bengal—And of Bombay.

The right
to parti-
tion.

HAVING now considered the process by which things partible are divided amongst the members of a joint family, the next subject relates to the right to call for or put in motion the machinery by which a partition is effected. This again must be treated of with respect to the rival doctrines of the Mitakshara and the Dayabhaga, for according to the former every male member of the family is a co-parcener with all the rights of a co-proprietor; whereas in the latter the father's power completely overwhelms and destroys whatever rights may theoretically pertain to the son.

According
to the
Daya-
bhaga.

Amongst brethren, according to the Dayabhaga, each one or his representatives have a right to insist upon a partition. A mother cannot demand a partition as against

her sons, but a widow can demand it as against her deceased husband's brothers. The co-proprietorship under this school is very similar to the tenancy in common in English law; and the tenancy is severed, and the right to call for such severance is regulated, upon very similar principles to those which are laid down in English law.

LECTURE
IV.

But with regard to the Mitakshara system there is a considerable difference between its doctrines and those of the Dayabhaga on the subject of partition.

According
to the
Mitak-
shara.

As respects the right to compel a partition, the High Court of Bengal, in a case governed by Mitakshara law, has laid it down that* "it is a settled doctrine of the Hindu law that every member of a joint undivided family has an indefeasible right to demand partition of his own share. The other members of the family must submit to it, whether they like it or not. According to the Mitakshara, a son is competent to compel even his own father to divide the family estate when that estate is joint and ancestral."

The Supreme Court of Bombay, however, in a suit brought by a son against his father and brothers for partition, held† that the right to compulsory partition, if it exist at all, does not extend to moveable property. "The highest authorities" they said "recognized in Hindu law hold as between a father and his sons in the distribution of paternal or other ancestral estate, the father takes the moveable property absolutely or subject only to certain conditions." The Court also expressed its opinion that there was no right existing in the son to compel partition of ancestral immoveable estate during his father's life

Right of
the son to
partition.

Rulings at
Bombay.

* Mussamut Deo Bunsee Koer v. Dwarkanath and others, 10 S. W. R., p. 273.

† Ramchandra Dada Naik v. Dada Mahadev Naik, 1 Bombay Reports (2nd edition), Appdx., p. 76.

LECTURE
IV.At the
other
Presiden-
cies.

against his will; or that if such right existed it only accrued upon the happening of certain contingencies.

The Courts at the other Presidencies have not adopted that view. Sir Thomas Strange, no doubt, formed the opinion that sons could not demand division, except under particular circumstances, even as regards ancestral property. He* says that unless a father is *civiliter mortuus* or has otherwise forfeited his civil rights, partition in his life-time, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons.

In a suit† brought by a grandson against his grandfather and his paternal uncle for partition of the undivided family property, it was contended that the plaintiff's father if alive could not have sued for partition living his own father,—i. e., the grandfather of the existing plaintiff. The High Court of Madras overruled this contention. Referring to the first chapter of the Mitakshara and comparing its fifth section with the seventh paragraph of its second section, Sir Colley Scotland observed that "they were not necessarily inconsistent, and that sons might compel a division of ancestral family property at the hands of their father." This ruling was distinctly limited to ancestral property only.

* 1 Strange's Hindu Law, p. 179.—Whatever might be the case among the Hebrews, no Hindu can, according to the law, as it prevails in the Bengal provinces, under any circumstances, say to his father in the peremptory language of the prodigal, "father, give me the portion of goods that falleth to me." The father may abdicate in the favour of one or of all according to the limits imposed upon him by law, if he thinks proper; but with the exception of two cases, partition among Hindus, in the life-time of the father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons.

† *Nāgalinga Mudali v. Subbiraniya Mudali*, 1 Madras Reports, A. C., p. 77.

According to the author of the Mitakshara* "in property, which was acquired by the paternal grandfather, the ownership of father and son is notorious; and therefore partition does take place. For or because the right is equal, or alike, therefore the partition is not restricted to be made by the father's choice, nor has he a double share." Sir Thomas Strange's opinion therefore is directly contrary to the Mitakshara, so far at least as respects the passage I have quoted. No doubt, the Mitakshara is somewhat vague upon the subject but notwithstanding the uncertainty there observable, the High Court of Madras in the case which I have quoted adopting the rule laid down by Mr. Justice Strange in his 'Manual of Hindu Law,' founded probably upon the decisions which had taken place, held that so far as ancestral property was concerned, sons may at their will and irrespective of all circumstances, compel their father to divide it with them. They considered it also more satisfactory to decide that the right existed absolutely than that it should depend on the feelings or disposition of the father or the physical disposition of the mother.

According to a decision† of the High Court of Bengal, partition can take place, notwithstanding the minority of some of the co-parceners. A partition between brethren is expressly authorized by the Mitakshara, even though a co-parcener entitled to a share is unborn at the time. Whether that co-parcener be a brother or a nephew, provision is made for the allotment of a share to such co-parcener, if at the time of the partition he was in the womb

* Chap. I, Sec. V, para. 5.

† Mussamut Deo Bunsee Koer v. Dwarkanath and others, 10 S. W. R., p. 273.

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of his mother, her pregnancy not being manifest; otherwise the partition should be postponed till after the delivery.

It is not necessary to the application of this rule that there should be more than one adult member existing in the family.

A minor however cannot enforce partition merely at his own option or at the option of his guardian, there must be reasonable ground for his insisting upon it. The Madras High Court declared that the true rule* to be observed was that a suit on behalf of a minor for partition would lie if the interests of the minor were likely to be prejudiced by the property being left in the hands of the co-parceners from whom it is sought to recover it.

Agreement
restraint of
partition.

An agreement, whereby the co-parceners consent with one another that the property shall remain joint, and that the right to partition shall not be exercised, will only bind those who enter into it. It is not a consent which will run with each co-parcenary right, into whose soever hands it may pass. In a case† recently decided, the plaintiff who sued for partition, was a purchaser at a sheriff's sale of a share of an estate belonging to a Hindu joint family, the members of which had come to an agreement not to partition the estate. The defendant relied upon this agreement in order to defeat the plaintiff's claim to a partition. It was held that he was not bound by the arrangement.

Apportion-
ment of
shares.

With reference to the proportion in which co-parceners divide the joint property at partition, equality of division is the rule and inequality an exception which must be justified by some recognized law. "Unequal partition,"

* *Kamakshi Ammel v. Chidambara Reddi*, 3 Madras Reports, A. J., p. 94.

† *Anandchandra Ghose v. Frankisto Dutt*, 3 B. L. R., O. C., p. 14.

says the author of the Mitakshara* “is found in the several ordinances; but it must not be practised: because it is abhorred by the world; since that is forbidden by the maxim ‘Practise not that which is legal but is abhorred by the world, for it secures not celestial bliss.’ An unequal partition is only valid, when the distribution is rendered uneven by means of deductions allowed by law.”

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This principle of equality of division extends to secure Equality of division. to the wives shares† equal to those of the sons, when such wives have not received *stridhun* from the husband or father-in-law. This is in the case of a father making a partition in his life-time. The most usual period for partition is after the father’s decease “let sons divide equally Sons. both the effects and the debts after the demise of their two parents.” It seems that if the wife has *stridhun*, she will receive half a son’s share.

Daughters, however, share the residue of their mother’s property, after payment of her debts. As the sons, and not daughters, are liable for the mother’s debts, the sons may take a sufficient portion of her property to answer those debts. With regard to daughters the text of Gautama is cited: “A woman’s property goes to her daughters, Daughters. unmarried or unprovided”—that is, the unmarried daughters take precedence as heirs, and among the married daughters, it goes to those who are destitute of wealth. Next to the daughters, the daughters’ issue succeed to the mothers’ separate property. If there be no daughters then the son, or other male offspring succeeds.

According to the Dayabhaga two modes of partition Brethren. among brethren of equal class were originally propounded,

* Mitakshara, Chap. I, Sec. III, verse 4.

† Mitakshara, Chap. I, Sec. II, verse 9.

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Mother.

but equal allotments amongst the co-heirs are alone practised. When partition is made among brothers of the whole blood, after the demise of the father, an equal share must be given to the mother, provided she has no separate property, for a text* of Vrihaspati expresses, "the mother should be made an equal sharer." But the stepmother is expressly stated not to be intended by the text. With regard to stepmothers,† wives of the father, it is said who have no male issue, not those who are mothers of sons, must be rendered equal sharers with the son.

Sons by
different
wives.

There were three cases decided in the Supreme Court of Bengal‡ in which it was held that, on a partition between sons by different wives, each mother is only entitled to share equally with her own sons, the aggregate of the shares which an equal division amongst all the brothers allots to her sons. The correctness of this doctrine was in the case of *Callychurn Mullick v. Janova Dossee*§ strongly contested before the High Court. The Judge who tried the case, though he expressed disapproval of the doctrine, considered himself bound sitting as a single Judge to follow the decisions of the Supreme Court. The case was compromised at the last moment before it was heard by the Appellate Court. It was generally understood, however, that the Judges of the Court of Appeal shared in the doubts expressed by the lower Court as to the correctness of those decisions. The doctrine contained in them was considered to militate against two fundamental principles of Hindu law that a widow's right to a sufficient and suitable maintenance

* Dayabhaga, Chap. III, Sec. II, verse 29.

† *Ibid*, verse 32.

‡ See Sir F. Macnaghten's *Consideration of Hindu Law*, pp. 64 *et seq.*

§ *Indian Jurist*, N. S., Vol. I, p. 284.

before partition is a charge upon the whole of her late husband's estate, and that all sons, with some insignificant exceptions, are entitled on partition to share, equally and alike in all their father's property.

But equality of division, however, is the invariable rule with regard to joint property, whether ancestral or acquired, without regard in the latter alternative to the proportion of industry or skill devoted to its acquisition. In the former alternative sons by different mothers take equal shares. It was held* by the Bengal Sudder Court in 1814, that a ruling to the effect that a son by one wife took one-half of the father's estate, while three sons by another wife divided the other moiety, was erroneous. They held that the shares of sons by different mothers should be regulated by the number of the sons and not by the number of the mothers, and that there being four sons each was entitled to one-fourth. A contrary contention would never be raised at the present day.

According to the pundits of the late Sudder Court of Bengal,† the proper mode of distributing an estate acquired by a joint and undivided family was to ascertain the quantity of funds and labor supplied by each individual member of the family and to apportion the shares accordingly; but that when this fact was not to be ascertained, the rule is that the property should be equally divided among the co-parceners. The Judges recorded their judgment that as it was impossible to ascertain with any degree of accuracy the *quantum* of labour and funds supplied by each of the members of the family, it was equitable to make an equal distribution thereof.

* *Sumrun Singh v. Khedun Singh*, 2 Select Reports (new edition), p. 147.

† *Mussumut Dur Poottee v. Haradhun Sircar*, 3 Select Reports (new edition), p. 98.

LECTURE
IV.Unequal
Division.

With reference to unequal division, there was an old case decided in 1794* by the Sudder Court of Bengal in which the eldest of four brothers living together on a joint family acquired a zemindary, the fruits of his own industry. The principle was recognized that if the acquisition had been made, without use of a detriment to the joint estate, it would have belonged solely to the acquirer. The Court held that if it had been acquired by the expenditure of joint funds, or with the assistance of the brothers, then the zemindary being divided into five parts, the acquirer would take two parts and the other brothers, one each.

Division of
son's
acquisition.

With regard to property acquired by the son while living joint with his father and brethren, it was held by† Sir Barnes Peacock, C. J., that according to the law as current in Bengal, a father is entitled to a share of his son's self-acquired property. If the property‡ is acquired by the son at the charge of the father's estate, the father is entitled to a moiety, the son who makes the acquisition to two shares and the rest to one share each. If the father's property has not been used the father has two shares, the acquirer as many and the rest are excluded from participation.

Of mother's
separate
property.

With regard to the mother's separate property according to the Mitakshara, the daughters divide the residue after payment of her debts. According to Gautama the preference is given to the unmarried daughters, and amongst the married ones to those who are destitute of wealth and

* Gudadhur Serma v. Ajoodharam Chowdry, 1 Select Reports (new edition), p. 7.

† Uma Sundari Dasi v. Dwarkanath Roy, 2 B. L. R., A. C., p. 287.

‡ See Dayabhaga, Chap. II, verse 65 and following verses; and Vyavastha Darpana, p. 385.

their issue succeed in their default, and if there be no daughters, then their sons will take.

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According to the Dayabhaga* all the uterine brothers and all the uterine sisters on the authority of Menu† equally divide the maternal estate.

Special rules are enunciated both in the Mitakshara and the Dayabhaga with regard to a partition amongst sons belonging to various tribes.

With regard to a son who is born subsequently to a partition of the estate, he according to the Mitakshara "shares the distribution" which is declared to mean the allotments of the father and mother. In other words after the death of his parents, he takes the father's portion and he is next heir to his mother's portion after her daughters to the exclusion of his brothers.

Rights of
the son
born after
partition.

Menu propounds the rule in these words "a son born after a division shall alone take the parental wealth." Vrihaspati says "a son born before partition has no claim on the wealth of his parents, nor one begotten after it, on that of his brother."‡ The right of the son subsequently born, is not merely to the father's allotment but also to his subsequent acquisitions.§ He will however participate with such of the brethren as are re-united with the father. A posthumous son born after partition made, when the mother's pregnancy was not manifest, is entitled to an allotment equal to that of one of his brothers. If the pregnancy is manifest, partition should not be made until the birth.|| The same rule applies to the case of a nephew

* See Chap. IV, Sec. II, verse 1.

† 9 Menu, 192.

‡ Mitakshara, Chap. I, Sec. VI, verse 4.

§ 9 Menu, 216.

|| Mitakshara, Chap. I, Sec. VI, verse 12.

LECTURE IV. born by a brother's widow after the separation of the brethren.

Both under the Mitakshara and Dayabhaga.

The law of the Dayabhaga* is similar in this respect to that of the Mitakshara. The author quotes texts of Menu and Nareda who say that the son born after partition "shall alone take the paternal wealth ; or he shall participate with such of the brethren as are re-united with the father." If, however, the father die after re-uniting himself with some of his sons, the son born after partition shall receive his share from the re-united co-heirs. The meaning is expressed to be the same as in the Mitakshara,—viz., that the son meant is one whose conception is subsequent to the division of the estate, whose father was separate at the time of the procreation. Therefore if the sons were separated from the father, while the mother was pregnant, but not known to be so, the son who is afterwards born of that pregnancy shall receive his share from the brothers, that is to say there must be a fresh partition. Consequently, he who is born previously to the partition is not entitled to any portion of the estate allotted to the father or subsequently acquired by him ; nor is one begotten by the separated father entitled to the estate of his brother. And in the eighth chapter of the Dayabhaga it is added that a co-parcener who has left the common family and resided in another country is entitled on his return to receive a share of the common property whether it has been partitioned or not. And in the Mitakshara,† effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares.

* See Dayabhaga, Chap. VII.

† Chap. I, Sec. IX, verse 1.

In the Madras High Court* there was recently a suit by sons born after a partition by their father. They sued their father and two sons who were born before partition, in order to obtain a partition and possession of their shares. It was held that the rights of after born sons to a share of property already partitioned are confined to those sons who were at least begotten before partition. Membership in the family, for all purposes including the acquisition of proprietary right is considered to commence from the conception by the mother.

LECTURE
IV.Madras
ruling.

The Hindu law further sanctions the allotment of an additional portion to a member of an undivided family who by his own exertion and expense "recovers" joint property from the occupation of a stranger.† Such rule appears to have been recognized by the Bengal Sudder Court‡ in 1801, though a claim founded upon it was rejected owing to the peculiar circumstances of the case. The additional portion is said to be one-fourth. It must be understood, however, that the law on this subject does not apply to cases of disputed inheritance; it applies§ to cases where the property has been seized by others or lost, cases in which it has passed from the family to strangers and has been held by them adversely to the family, and not merely under an alleged, though an unfounded title, as members of the family.

Recovered
property.

A claim of this kind is very seldom heard of. In one case recorded by Mr. Macnaghten,|| an elder brother re-

* Yekeyamian v. Agniswarian, 4 Madras Rep., p. 307.

† See Dayabhaga, Chap. VI, Sec. I, verse 28.

‡ Radhachurn Rai v. Kissenchund Rai, 1 Select Reports (new edition), p. 44.

§ Bissessur Chuckerbutty v. Seetul Chunder Chuckerbutty, 9 S. W. R., p. 70.

|| 2 Macnaghten, p. 157, case 111.

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IV. ate in residence and food, it is also separate in estate."

This presumption in the case of the family then litigating before it, was corroborated by the fact that the brothers had allowed the widow to succeed and take possession of her husband's estate, in the same way as she would have done, if he had been admittedly separate in estate.

Proof that each brother manage his own affairs respecting the estate, and collects his own rents, either separately or through one general agent for all the brothers, and pays his revenue separately, shews that the brothers have separated in estate as well as in residence. "It is not necessary" say the Privy Council "that there should be any actual butwarrah or division of land, a division of shares and separate possession of the divided shares is sufficient."

According
to the
Daya-
bhaga.

I will now cite another case which was governed by the Dayabhaga.

In it the plaintiff* sued to recover a half share of property left by his paternal uncle, who was also paternal uncle to the defendant. The plaintiff's father had separated from the deceased whose property was in dispute. The defendant and his father had not separated. It was contended that according to the law laid down in the Dayabhaga there was no distinction between an associated and an unassociated brother so far as the right of succession was concerned, the law however giving preference to a re-united brother.† It was ruled by the High Court that

* Kesabram Mahapattar v. Nandkishore Mahapattar, 3 B. L. R. A. C., 7.

† See Dayabhaga, Chap. XI, Sec. V, verse 10. A re-united brother shall keep the share of his re-united co-heir who is deceased; or shall deliver it to a son subsequently born,—*Ibid*, 36. But among whole brothers if one be re-united after separation, the estate belongs to him; if an unassociated whole brother and re-united half brother exist, it

the defendant was entitled to the estate, simply on the ground that the united brother takes in preference to the separated. It does not appear whether the Court considered that the united brother was preferred upon a principle inherent in the theory of joint families, or whether a separation having once taken place those who subsequently lived in commensality must be regarded as reunited brethren. It had been previously* held, whether correctly or not may be matter of doubt, that the separation of one was the separation of all, and that those who did not separate as between themselves must be regarded as reunited.

In another case† which was governed by Mitakshara law, the father granted his ancestral estate which was governed by the Mitakshara law, so that it should be divided into two equal moieties, one to go to the sons then living born of the first wife, and the other to the then existing sons of the second wife. No adjustment was made of the shares of the sons of the respective wives; no allotments were made to the wives, nor did it appear that the wives had any separate property. The father reserved to himself a life estate in a portion of the property and the control over the whole. Such a grant was held to be in the nature not of a partition but of a settlement made by a father who had no power to make it without the consent of all his sons then living. It was

Distinction
between
settlement
and parti-
tion.

devolves on both of them; if there be only half-brothers the property of the deceased must be assigned in the first instance to a re-united one, but if there be none such then to the half-brother who is not re-united,—*Ibid*, 39. If there be competition among claimants of equal degree whether brothers of the whole blood, or brothers of the half-blood, or the sons of such brothers, or uncles or the like, the re-united parcener shall take the heritage.

* Jadubchunder Ghose v. Russickchunder Ghose, 1 Hyde, p. 214.

† Hurroodoot Narain Sing v. Beer Narain Sing, 11 S. W. R., p. 480.

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pointed out by the Court that the effect of such a settlement if valid would be as regards a subsequently born son very different from what the effect of a legal partition would have been. For if there had been a legal partition the father would have taken a share, and each of the two wives would have taken a share, and on the death of the father the plaintiff as a son born after partition would have taken the whole of his father's share and the whole of his mother's share* if there were no daughters.

It was held that the right of the son born after partition attached to his share of the property, that no subsequent assent of the other sons to the settlement after his birth would be binding on him, and that he was not in any way bound by the arrangement.

Partition
by widows.

If, however, two widows of the same man partition their deceased husband's estate, the effect of such division is merely to divide the enjoyment; the title is wholly unaffected by it. Their title remains joint, the surviving widow takes the whole, neither widow has a separate power of alienation, and the reversionary heirs of the husband take nothing until the death of the survivor. There was a case decided by the Privy Council† in which this subject was discussed. A Hindu died at Benares childless, and he was separate in estate from his brethren, if he had any; his wealth was self-acquired, consequently his two widows were his co-heiresses. The property was divided between them, each widow was put in possession of her share, and finally one of them died in the separate possession and enjoyment of her share. She disposed of this share by will in favor of her father and brother. One

* See Mitakshara, Chap. I, Sec. VI, verse 2.

† Bhugwandeem Doobey v. Myna Bacc, 11 Moore's I. A., p. 487.

question decided in the suit was whether the surviving widow succeeded to the share or whether the deceased widow had validly disposed of it. Another point in the case was whether the surviving widow had not by partition lost her right by survivorship in consequence of the alienation.

The Privy Council remarked "the estate of two widows who take their husband's property by inheritance is one estate, the right of survivorship is so strong that the survivor takes the whole property to the exclusion of even the daughters of the deceased widow. They are therefore in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other.

Further, the fact, that something in the nature of partition had been made between the two widows, did not operate to enlarge either widow's estate so as to give her a greater power of disposition over it, than she would have otherwise had. The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property even to the exclusion of daughters of the deceased widow. They are therefore in the strictest sense co-parceners, and one widow cannot alienate any portion of the estate without the consent of the other." The case, as the Privy Council observed, might have been decided upon that ground alone.

After a partition it sometimes happens that the parties so separated re-unite. Vrihaspati says "he who being once separated dwells again through affection with his father, brother or paternal uncle is termed re-united."* And the

* Mitakshara, Chap. II, Sec. IX, verse 3; Dayabhaga Chap. XII, verse 3.

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author of the Dayabhaga adds that a special association among persons other than the three relations enumerated by Vrihaspati, is not to be acknowledged as a re-union of parceners. The right of re-union therefore is limited.

It seems that in order to constitute a re-union after partition, mere living together in one residence or the carrying on a joint trade is not sufficient : there must be a junction of estate.*

Limitation
of the right
to effect
re-union.

And with reference to the limitation to the right of re-union declared by Vrihaspati, that text, together with passages of the Vayavahara Mayukha and the Dayabhaga and Dayakrama Sangraha, was discussed by the High Court of Bombay. They decided that whatever other limitations there might be to the power of re-uniting, at all events the meaning of Vrihaspati's text which is the foundation of the law is that those only who had separated could re-unite. If any of their descendants thought fit to unite they could do so, but such a union is not a re-union in the sense of the Hindu law. It is a special association, but it does not serve to obliterate the effect of the partition. The members of a re-united family and their descendants succeed to each other to the exclusion of the members of a branch not re-united. The limit therefore to the right of re-union is in fact a limit to the right to alter the ordinary course of inheritance which ensues from partition. For when a valid re-union has once taken place between parties legally capable of re-uniting, they, their representatives and descendants, however remote, will again form a joint and undivided family until a fresh partition takes place in

* Gopal Chunder Daghorla v. Kenaram Daghorla, 7 S. W. R., p. 35.

† Vishvanath Gangadhar v. Krishnaje Ganesh, 3 Bombay H. C. Rep., A. C. J., p. 69.

precisely the same way in which they would have done so if LECTURE
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no severance had ever been effected.*

The following passages show the position of this subject according to the received authorities upon Hindu law. Sir Thomas Strange† says,—“Not only may an original partition be re-formed by means of a supplemental one, but there may be an entirely new one upon a re-union of any of the separated parceners, competent to the purpose, and this as well after partition by a father, as among co-heirs.” And Sir Francis Macnaghten, in his Considerations on Hindu Law,‡ says,—“After separation, and a partition actually made, families may be again united. This, however, is an event which seldom happens. I do not know an instance of it, and the Supreme Court’s Pundits inform me that none has ever fallen within their knowledge.”

In the Mitakshara,§ it is said, “Re-union cannot take Mitak-
shara. place with any person indifferently; but only with a father, a brother, or a paternal uncle, as Vrihaspati declares: ‘He who being once separated, dwells again through affection with his father, brother, or paternal uncle, is termed re-united.’”

In the Dayabhaga,|| after quoting Vrihaspati, it is Daya-
bhaga. said,—“A special association among persons other than the relations here enumerated is not to be acknowledged as a re-union of parceners, for the enumeration would be unmeaning.”

* And see *Kuta Bully Viraya v. Kuta Chudappa Vuthamulu*, 2 Madras Reports, p. 235.

† Strange’s Hindu Law, Vol. I, p. 233.

‡ Page 107.

§ Chap. II, Sec. IX, verse 3.

|| Chap. XII, verse 4.

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Daya-
krama
Sangraha.

The following passages from the Dayakrama Sangraha* show what Srikrishna Tarkalankar understood by the term "re-united" in Vrihaspati; and what, according to that author, was the doctrine on the subject of re-union. He quotes the text of Vrihaspati, and thus proceeds:

"Where a person has been once disunited from his father and the rest, afterwards the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being concluded to the following effect,—'The wealth which is thine is mine—that which is mine is thine,'—they resolve on dwelling in the same abode. This is considered re-union.

"Here, since the father and the others are particularly specified, re-union takes place with those who are alone described, and not with nephews and the rest who are not named; otherwise the specific mention of father and the others would be unmeaning. Such is the opinion according to the Dayabhaga."

Mithila
doctrine.

"The followers of the Mithila school admit re-union much more readily than those of the other schools. They are of opinion that the use of the term 'father and the rest' is figurative, and that re-union takes place when those whose right to a share of the common property is established by their birth, re-associate, after having once separated; consequently that re-union can occur with nephews and the rest."

Vyavahara
Mayukha.

In the Vyavahara Mayukha,† there is this passage:—
'Now we proceed to expound the doctrine of re-united co-parceners.' On this subject Vrihaspati defines re-union:
'He who being once separated, dwells again through

* Chap. V, verses 3, 4, & 5.

† Chap. IV, Sec. IX, verse 1.

affection with his father, brother, or paternal uncle, is termed re-united.' This re-union, according to the Mitakshara and others, can only take place with a father, brother, or paternal uncle,—not with others, because no others are included in the text. But the proper sense is, that this re-union arises even from the joint location of the makers of the first partition. . . . Hence re-union may take place with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also. 'He who being once separated from the co-heirs dwells again in common, is termed re-united:' This author, it is said in a note to the passage quoted, differs from all others in his doctrine.

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In the case of *Tarachund Ghose v. Puddum Lochun Ghose*,* the whole subject, so far as it is understood, was discussed by the High Court of Bengal. It was contended that, according to Hindu law, when the parties claiming stand in the same degree of blood relationship, he who is of the associated or re-united family takes to the exclusion of the unassociated branch who remain wholly separate. The High Court made the following observations: "Re-union does not seem to take place frequently among Hindus in the present day, if we may judge from the scarcity of reported cases in the Courts which have any bearing upon the subject. Nevertheless there is no doubt that re-union has always been recognized by the Hindu law, and that the right of succession is affected by it. Indeed, if re-union be recognized at all, we certainly should expect to find that it affected the law of inheritance when we consider the general principles on which that law is founded, and when we bear in mind the extent to which joint tenancy

High Court
of Bengal.

* 1 Ind. Jur., N. S., p. 207; S. C., 5 S. W. R., p. 249.

LECTURE among members of the same family is favoured by the
 IV. Hindu law.”*

Sir Francis Macnaghten says that he knows of no instance of re-union after partition, and that the pundits had not been able to inform him of any such case. He drew attention to the endless confusion which exists on the subject. Nor is the law clearly or satisfactorily laid down either by him or by any other writers on Hindu law. The High Court remarked in the case cited above, that the conclusion at which they had arrived was the result of a general consideration of all the authorities and of the principles on which re-union and the few rules as to inheritance in reunited families which are distinctly given are based. “In the *Dayabhaga*,”† they said, “we find it declared that if there be competition between claimants of equal degree, whether brothers of the whole blood or brothers of the half-blood, or sons of such brothers, or uncles or the like, *the reunited parcener shall take the heritage*: for the text does not specify the particular relations, and all these relations were premised in the preceding text, and a question arises regarding all of them. Therefore the text must be considered as not relating exclusively to brothers. This paragraph is directly in favour of the contention raised, and there is nothing to alter its effect in the preceding paragraphs‡ which all have more or less bearing on the question. On the other side it is argued that it is only as between the persons actually named in these texts,—i. e. brothers, uncles, &c.,—that re-union causes any change in the rule of inheritance. But it appears to us that though the texts may

* Considerations of Hindu Law, p. 107.

† Chap. XI, Sec. V, verse 39.

‡ See verses 26-28.

limit the classes of persons to whom it is permitted to re-unite themselves, they do not limit the continuance of the re-union once perfectly effected : in other words, we think that if a re-union actually takes place between the proper parties, their representatives and descendants, however remote, will remain joint until a fresh partition takes place, exactly in the same manner as in an ordinary case of a joint family the members remain joint until partition."

And then referring to such other authorities as are to be found, they proceeded : "The *Dayakrama Sangraha*,* which we construe as we do the *Dayabhaga*, likewise generally supports the contention made.† The text books of the other schools of Hindu law lead to the inference that, according to those schools also a re-united parcener would take the inheritance."‡ There are two cases cited in *Macnaghten's Hindu Law*§ which support the proposition that where there is particular evidence of an express and distinct re-union, then the associated brethren alone succeed to the exclusion of the unassociated brother. In the case of *Jadubchunder Ghose v. Russickchunder Ghose*,|| Sir Mordaunt Wells considered that, according to Hindu law, if only one brother out of four separates entirely, it is a virtual separation of all, and though the remaining three brothers continue still joint, they are to be supposed to have re-united.

In the case of *Vishvanath Gungadhur v. Krishna Gunes*,¶ the subject of re-union was discussed by the High And of
Bombay.

* Chap. V.

† See also Shamachurn's *Vyavastha Darpana*, p. 204 ; Colebrooke's *Digest*, Book V, Chap. VIII, verse 433.

‡ See *Mitakshara*, Chap. II, Sec. I, and *Vivada Chintamani*, p. 304.

§ 2 *Macnaghten*, pp. 72, 173.

|| 1 *Hyde*, p. 214.

¶ 3 *Bombay H. C. Rep.*, A. C. J., p. 69.

LECTURE
IV.
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Court of Bombay. The defendants in the case resisted the claim of the plaintiff to share in the property of the deceased, on the ground that they had been re-united with the deceased, while the plaintiff had not. It appeared that the partition had not taken place between the deceased and the rival claimants, but between their respective fathers. The question was, whether, under those circumstances, the alleged re-union between the defendant and the deceased was such a re-union as Hindu law contemplates, and whether it could operate to alter the course of inheritance and to enable the defendants in their alleged character of re-united brethren to exclude the plaintiff from his share of the property."

The High Court said,— "there is little to be found in Hindu law books on the subject of re-union, and scarcely any reported cases in the Courts bearing upon the subject." They referred to the case of *Tarackund Ghose v. Puddum Lochun Ghose** and to the discussion of the subject contained in the judgment delivered with respect to it. The Court held in the case before them that the re-union must be made by the parties or some of them who made the separation. If any of their descendants think fit to unite they may do so, but such a union is not a re-union in the sense of the Hindu law, and does not affect the inheritance.

* 5 S. W. R., p. 249.

LECTURE V.

THE LAW OF SUCCESSION.

General observations—Primitive notion of succession—Representation—Character of the Hindu system of succession—Growth of the doctrines of the Dayabhaga—The earlier system of the Mitakshara—The Dayabhaga—Points of difference between the Dayabhaga and the Mitakshara—Succession by survivorship—When it takes place—Extent to which it prevails according to Bengal High Court—According to Madras High Court—Right by survivorship conflicts with the right of the widow—Question to which it has given rise—Mitakshara to some extent postpones the right of the widow to that by survivorship—Dayabhaga excludes the right by survivorship—Privy Council defines the widow's right under the Mitakshara—Her right is to the separate estate of her husband—Shivagunga case—The question at issue therein—Two courses of descent may obtain in the same family—There need not be unity of heirship—Right by survivorship extremely limited—Impartible estate may be joint property—Query, whether females originally took by survivorship—The Privy Council upon survivorship.

THE branch of the subject at which we have now arrived is one of considerable difficulty. The source and history of a law, which in any community ascertains a dead man's successor, and defines the manner in which the devolution of his legal position, of his rights and obligations, takes place, bear the closest relation to the constitution and character of that community. Death and its consequences compel men, in any stage of social existence, to ascertain, by some conscious or unconscious process, what was the relative position of the deceased to the community of which he was part, how that position is to be transferred to another, and upon what principle his successor is to be

General observations.

LECTURE
V.

selected. Whatever of legal principle or of religious doctrine exist among a people will be tasked to find from time to time the solution to these questions, which are of practical importance, long before they are subjected to scientific analysis. Every society, which has begun to exist in a civilized state, distinguishes at that moment between the physical person which perishes, and the legal personality or ownership of rights and duties which survives. The bestowal of this ownership is determined by the same social and religious feelings which determine the general character and condition of the society.

Primitive
notion of
succession.

In the earliest stage of society, the idea of succession would be derived from the transference of authority from the deceased head of a group or family to the person who stepped into his place. The collective existence of the family would continue as before, although the individual would have stepped out of its ranks. The ownership or legal position which belonged to him in his personal or official character was continued in others; the family or corporation lived on as before; and thus we have the first notion involved in the law of succession,—*viz.*, the continuity of legal existence, the doctrine of survivorship.

Repre-
sentation.

In later stages of society, in Roman and English jurisprudence, and to a very large extent also in Hindu jurisprudence, there is another idea involved in the law of succession,—*viz.*, the doctrine of representation. When the individual supersedes the family as the unit of society, instead of the family continuing its aggregate existence, regardless of the decease of one or more of its members, one individual succeeds another as his representative, as the person in whom the legal being of the deceased lives on, that is as his heir or successor. In either case the

system is based upon the legal notion of the eternity of rights and obligations; in either case death is eliminated from the view of the jurist. When society is an aggregate of families, the continued existence of the corporation is unaffected by the death of the individual. When society becomes an aggregate of individuals, the fact of death is lost sight of in the instantaneous representation of the deceased by his heir or co-heirs.

Now in Hindu jurisprudence, old as it is, we have but few relics of the older form of succession, which rests on the doctrine of survivorship, or the actual continuance of aggregate existence, as opposed to the doctrine of representation, or constructive continuance of individual existence. Those relics are fewer than might have been expected, when we consider the tenacity with which by far the larger portion of the Hindu race have clung to the traditions and practice of joint family life. The explanation is to be found in the circumstance of a still stronger principle existing in Hindu society than that which underlay the communal system,—viz., the religious conviction which bound each member of the family not so much to his contemporaries as to his own immediate ancestors and descendants. The influence of religion was opposed to that of joint family usages, and gave to each member of the family a sense of separate life. Each was joint with the others as regards temporal affairs and temporal possessions; but each individual was the centre of his own *sapinda* connexions, the degrees of which were calculated in reference to himself personally, and the members of which were ascertained solely with respect to him as an individual and without reference to the fact that his existence, while it lasted, was absorbed in that of a joint family.

Lectures
V.
—

Character
of the
Hindu
system of
succession.

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V.

The quick play of modern transactions and modern life is adverse to the continuance of those corporate family institutions which are chiefly visible in the early stages of the world; but the religion of the *shraddha* was from the first a rival and an antidote to their oppressive influence. The law of the *shraddha* is said to be the key to the whole Hindu law of inheritance; the conflict between the religious devotion which regulates the observance of funeral obsequies and the social usages produced by communal life is, I think, the key to the history of that law and of the mode in which it was developed.

Growth of
the doc-
trines of the
Daya-
bhaga.

It is stated, upon high authority,* that there is scarcely a trace in the unwritten customs of Hindus of the existence of the doctrine which now prevails,—viz., that of spiritual benefit to the deceased determining the order of succession to his estate. However that may be, it is a doctrine which is common to all the existing schools of Hindu law, and is the basis upon which the law of the Dayabhaga exclusively rests. And it may easily be conjectured that an early innovation upon the archaic type of the family with its rights of survivorship, one of the first results of individual energy beginning to break loose from the trammels of the corporate system, was the introduction of a rule, by which the lineal male descendants succeeded to the place or interest of a

* Maine's Village Communities, p. 53. "I have been assured from many quarters that one sweeping theory, which dominates the whole codified law, can barely be traced in the unwritten customs. It sounds like a jest to say that, according to the principles of Hindu law, property is regarded as the means of paying a man's funeral expenses, but this is not so very untrue of the written law concerning which the most dignified of the Indian Courts has recently laid down, after an elaborate examination of all the authorities, that the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor."

deceased member of a joint family, by a title paramount to the general right by survivorship. Such a rule would naturally be adopted, as soon as the sense of individual rights, of the separate title of each co-parcener to a share, began to supersede the older notion of joint ownership by the aggregate family. The right of lineal succession, when once firmly established, indicates that the individual is no longer entirely absorbed in the joint family, but has rights and obligations which concern himself alone.

LECTURE
V.
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Again, at the death of one who is the last surviving male member of the joint undivided family, we reach the stage at which the heritable right of women first become recognized, and at which, failing the female members of the family, the relative rights of divided collaterals must be fixed and ascertained. Succession by survivorship amongst males would necessarily be limited to the case of persons living in co-parcenary with a deceased, who has died without male issue. The succession of those of a different family, would seem in early times to have been postponed till all the members, male and female, of the deceased's family were extinct. The claims of family relationship and of blood relationship have, however, according to the latest doctrines, been entirely superseded by the claims which grow out of the doctrine of spiritual benefit, and which are regulated by the degrees of capacity to confer that benefit.

At the present day whatever traces still exist of the earlier mode of succession by survivors must be sought in the law of the Mitakshara. Under that system, the joint family preserves more completely than under any other the spirit of the primitive Hindu society. By that law the property of the family vests in all its male members, with the occasional exception of some one of them, who

The earlier
system of
the Mitak-
shara.

LECTURE
V.

may be under a legal disability to hold or exercise proprietary rights. The parcenership of each member commences with his birth, his rights however dating back to the moment of conception. In the same way it terminates with death or with any other event which in law prevents a man from being the owner of property. And thereupon the surviving male members of the family become the owners of its estate by the strictest application of the doctrine of survivorship; their relations to one another in respect of the share to which each will be entitled on partition being modified by the application of the rival doctrine of individual representation.

The Dayabhaga.

In the conflict between the family and social usages on the one hand and the religious doctrine to which I have adverted on the other, the latter has, in the end, completely superseded the former; and accordingly in the teaching of the Dayabhaga, which is the latest development of Hindu law, the law of succession is exclusively based upon the individual right of offering, receiving, and participating in funeral oblations. The stages in the progress from succession by survivorship, which is the natural mode by which joint families succeed to each other, to the succession by the right of individual representation, which in its fullest development belongs to the latest period of Hindu jurisprudence, it is not now possible to discover. But a comparison of the two systems of the Dayabhaga and the Mitakshara, of the system in which the latest theory has entirely prevailed, and of that in which many older customs are retained, will show to some extent the character of the changes which time or policy had tended to produce, and the direction in which this important branch of law has been gradually developed.

It must be recollected that the rules which regulate the devolution of property by inheritance amongst Hindus are, at the present day, based upon the same principle in all the schools,—*viz.*, that of spiritual benefit. The chief points of difference between them, to which it is important to pay attention in order to understand the general scope and spirit of the existing Hindu law of inheritance, are the following:

LECTURE
V.
Points of
difference
between the
Dayabhaga
and the
Mitakshara.

First of all, there is the retention of a right of the older form of succession by survivorship in the Mitakshara joint family, the nature and extent of which I shall subsequently explain.

Secondly, the preference of particular schools for certain special texts, to meet the case of particular persons.

Thirdly, there is some recognition of the claims of blood relationship by the older school, another trace of its joint family usages and feelings resisting the dominant influence of the priests, who strive to refer every rule to the principle of spiritual benefit. In reference to this I may observe, that the author of the Dattaka Mimamsa describes the relation of sapinda to be two-fold,—*viz.*, through consanguinity and connexion by funeral oblations.* And in the Mitakshara *Acharya-banda*,† the consanguineal sapinda relation is described as follows: “The relation of sapinda is by connexion with (or by containing portion of) the same body; wherever the word ‘sapinda’ is used, there consanguinity must be known to exist directly or indirectly.” But in the Bengal school, at least for purposes of inheritance, the relationship denoted by the word ‘sapinda’ is that of connexion by the funeral cake,—i. e. the relationship

* Dattaka Mimamsa, Sec. VI, verse 32.

† See Shamachurn's Vyavastha Darpana, p. 889.

LECTURE
V.

between those who give, receive, and participate in the same funeral offerings.

Fourthly, the more general exclusion of females by the later school from the order of succession, and the refusal to them of absolute proprietary interest. In the older form of the law, although females were as a body postponed to the males of a family, still they, in their turn, took in preference to the members of a different family; and it would appear that they took a larger proprietary right than is now accorded to them. The order of succession became more favorable to the heritable classes of males, as the doctrine of spiritual benefit prevailed.

Fifthly, the mode in which the successive classes of heirs are arranged. Under the Mitakshara the cognates as a body, that is those relations who are members of a different family from the deceased, are postponed to the gentiles or those of the same family. In the Dayabhaga, the classes of heirs are *Sapindas*, *Sakulyas* and *Samanodakas*. In each class there are members of a different family or families from that of the deceased. That circumstance, however, though it affects the internal arrangement of each class, does not in any other way determine the order of priority. A *Sapinda* sprung of a different family will take precedence of a *Sakulya* sprung of the same family.

These are the chief points in which the existing schools differ from each other. The author of the Dayabhaga is the most determined as well as the latest exponent of the principle upon which the law of succession and inheritance is avowedly, and in the Bengal school exclusively, based. And, accordingly, in treating of that law in detail, I shall do so by the light of his treatise, pointing out from time to time the variations between his doctrines, which belong to

the most advanced school of Hindu law, and those of other schools which still retain some of the usages and defer to some of the feelings of older times. LECTURE
V.
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Before, however, I proceed to those rules of succession which are determined by the right or duty of individuals to offer the funeral oblation, and by the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased, it will dispose of one important point of difference between the Bengal and the Mitakshara schools if I first describe the extent to which the older doctrine of succession by survivorship is retained in the older school. Succession
by survi-
vorship.

In the first place, such succession, where it obtains, depends upon two circumstances,—*viz.*, the *status* of the family and the nature of the proprietary interest which belonged to the deceased. In other words, the family must be a Hindu joint family according to the law of the Mitakshara, and the estate in question must be held by co-parceners as joint estate; and the deceased co-parcener must be without male issue. If the deceased co-parcener left male issue, or if it were the separately acquired property of one member of the family, its devolution at his death will be determined by the law of inheritance, and not by the law of survivorship. When it
takes
place.

The extent to which succession by survivorship still excludes succession by inheritance or representation is explained by Sir Barnes Peacock, C. J., in the case of *Sodabart Prasad Sahu v. Foollbash Koer* :* “According to the Mitakshara law, if a member of a joint undivided family dies without a son, and leaving a brother, his widow does not take his share by descent. If he leaves a son, Extent to
which it
prevails
according
to Bengal
High
Court.

* 3 Bengal Law Reports (F. B.), p. 34.

LECTURE
V.

the son takes by descent; but if he leaves only a widow the survivors take by survivorship, and they hold the property which they take by survivorship legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased heirs have no interest either legally or equitably in the share which passes by survivorship to the surviving co-sharer. That will be made very clear if you suppose the case of a joint family consisting of a father and two sons and two uncles, the brothers of the father taking property by descent from the father of the father and of the two uncles. The father and the two sons take one-third, and two uncles each take one-third,—that is, they take that which, upon partition, would be allotted. Then suppose that one of the sons dies without issue, leaving a widow, such widow, according to the Mitakshara law, would not take his share in the estate. Then the question is, would it go to the person who would be heir if the widow was dead or had not existed? It clearly does not go to the heir, because the heir would be the surviving brother and not the father. If it would go to the heir, the surviving brother would take the whole of the interest of the deceased brother, but the law is that it goes by survivorship, and the survivors take legally and equitably for themselves, and not in trust for the brother of the deceased. Neither the widow of the deceased nor his brother would take any interest by inheritance from the deceased in the joint family estate."

According
to Madras
High Court.

According to the Madras High Court, the right by survivorship depends only upon the *status* of the family and not upon the nature of the deceased's proprietary interest. So long as the deceased dies as a member of a joint family, and without male issue, it is immaterial according to the ruling of that Court whether his property is self-acquired

and separate, or whether it consists of a share in the joint estate of the family. In the case of *Varadiperumal Udaiyan v. Ardanari Udaiyan*,* the Court said that, in the Madras Presidency at least, the law was clear that the immoveable property of an undivided member of a Hindu family might go to his surviving co-parceners, whether such property was self-acquired or ancestral. During his life, they added, he is entitled to the separate enjoyment of his self-acquired immoveable property with the right, if he have no male issue, to alienate the same. On his death without male issue, such property, if not previously alienated, devolves on his co-parceners, and his widow, whether childless or not, has no title to anything but maintenance.

LECTURE
V.

As the right by survivorship only comes into force in case of failure of male issue of the deceased co-parcener, it directly conflicts with the right of any widow whom he may have left behind him, and who, but for the existence of that right, would have taken his estate. The heritable rights of male issue have long superseded the right by survivorship, even under Mitakshara law. So also have the heritable rights of widows, under the Bengal school of authorities, according to whom the co-parceners themselves will rank in their order as heirs, and not as survivors. The extent, therefore, of the existing claim by survivorship as preserved by the Mitakshara law, can best be ascertained by a comparison of it with the rival claim of the widow under that law. No positive text is found which enables us to draw the line, and to say, on authority, when the right of the surviving co-parcener ends and that of the widow begins. But if the right by survivorship is a mere

Right by survivorship conflicts with the right of the widow.

* 1 Madras High Court Rep., p. 412.

LECTURE
V.

relic of the older form of family life, it is not a matter of surprise if the principles of Hindu law, according to its more recent expositors, should favor the title of the widow when it conflicts with that of the co-parcener.

Question to which it has given rise.

The question is whether the right of the surviving co-parcener is absolute to the whole of the property of the deceased, or whether it is limited to that portion of it which consists of a share in the joint estate. It is of course identical with the question whether the widow under Mitakshara law inherits the separate property of her husband who died joint with his brethren. It involves the further question whether there can be two courses of descent of the property of the same man,—whether one portion can go by survivorship and another by inheritance, according to the nature of the property regardless of the *status* of the individual.

Mitakshara to some extent postpones the right of the widow to that by survivorship.

The widow's right is discussed in the second chapter of the Mitakshara. It is pointed out that, according to some texts of Vriddha Menu, Vishnu, Katyayana, and Vrihaspati, the widow is first entitled to the succession to the whole estate when her husband has died without male issue. Other texts occur which are apparently adverse to the widow's claim. It is moreover argued that women should not inherit the wealth of a regenerate man, since that is designed for religious uses, and they are not competent to the performance of religious rites; and further that women having no right to independence cannot accept property. Both these arguments are refuted by the author of the Mitakshara, who declares the correct law to be that,*—"when a man who was separated from his co-heirs, and not re-united with them, dies, leaving no male

* Mitakshara, Chap. II, Sec. I, verse 30.

issue, his widow, if chaste, takes the estate, in the first instance." The rule, however, is confined to the widow of a separated brother. LECTURE
V.

On the other hand, the author of the *Dayabhaga*,* discussing the same texts, and referring also to those passages from *Sancha*, *Lichita*, *Devala*, and others, which apparently place the right of the brothers before that of the widow, rejects the notion of a right by survivorship altogether and also the compromise between conflicting texts insisted upon in the *Mitakshara*, which limits the right of a widow to succession to the estates of her separated husband. Dayabha-
ga excludes
the right
by survi-
vorship.

Then upon the question which both the *Mitakshara* and the texts which it cites leave open,—*viz.*, whether the title of the widow results from the *status* of the husband or the nature of the property,—the Privy Council in the *Shiva-gunga case* held that it was governed by the nature of the property, and thus they restricted the right by survivorship to such portion of the property of the deceased co-parcener as had been held by him in co-parcenary. Their criticism† on the second chapter of the *Mitakshara* which treats of the subject of the widow's claim was as follows:—Referring to the text which I have quoted, they say that it is propounded as a qualification of the larger and more general proposition in favor of widows, which affirms in general terms the right of the widow to inherit on the failure of male issue. "Consequently in construing it, we have to consider what are the limits of the qualification rather than what are the limits of the right. Now the very terms of the text refer to cases in which the whole estate of the Privy
Council
defines
the widow's
right under
the Mitak-
shara.

* Chap. XI.

† *Kattama Nauchear v. Rajah of Shivagunga*, 2 S. W. R. (P. C.), p. 31.

LECTURE
V.

Her right
is to the
separate
estate of
her hus-
band.

deceased has been his separate property, and, indeed, the whole chapter in which the text is contained seems to deal only with cases in which the property in question has been either wholly the common property of a united family or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that, because widows take the whole estates of their husbands when they have been separated from and not subsequently re-united with their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estate, although it may have been their husband's separate acquisition."

Shiva-
gunga
case.

The case in which these observations were made was heard by the Privy Council in appeal from the Madras Sudder Court, and it concerned the zemindari of Shiva-gunga in that Presidency, which was admitted to be in the nature of a principality, impartible, and capable of enjoyment by only one member of the family at a time. The rule of succession under such circumstances was, in the absence of a special custom of descent, admitted to be that of the general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. The last owner had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter, since dead, who left a son. The second also had a daughter, the third had two daughters, and the fourth was childless. Of the three widows, two were childless, and the third was *enciente* at the time of

her husband's death, and afterwards gave birth to a daughter.

Hence, if the zemindar at the time of his death with his wives and daughters and his nephews were members of an undivided Hindu family, and if the zemindari, though impartible, was part of the common family property, then it followed that one of the nephews was entitled to succeed to it on the death of his uncle as a surviving male co-parcener. If, on the other hand, the zemindar at the time of his death was separate in estate from his brother's family, the zemindari ought to have passed to one of his widows, and failing his widows, to a daughter or descendant of a daughter, preferably to nephews, following the course of succession which the law prescribes for separate estate.

LECTURE
V.

The ques-
tion at
issue
therein.

One question which the Privy Council proceeded to deal with was, what is the course of succession according to the Hindu law of the South of India, of such an acquired zemindari, where the family is in other respects an undivided family?

The litigation had continued concerning this property for upwards of thirty years, and the nature of the claims which came before the Privy Council for decision was such as to require a full discussion of the subject.

The daughter's son above-mentioned claimed in preference to the widows and in preference to the brother's descendants, and he was met by the contention that the eldest of the male co-parceners was entitled in preference to any descendant in the female line. The elder widow was another claimant, contending that a self-acquired zemindari could not be inherited by the brothers and co-heirs of the last owner, but in default of male issue

LECTURE
V.

descended to his widows, his daughters and parents in preference to his brothers or remoter collaterals.

Two
courses of
descent
may obtain
in the same
family.

The general course of descent of separate property, according to the Hindu law, was not disputed. It was admitted that, according to that law, such property descends to widows in default of male issue. But it was contended that the property in question, which was separately acquired, did not descend according to the general course of the law. That contention was based upon the fact (proved or assumed) that a general state of co-parcenership as to the family property existed; and further that there could not legally be property belonging to a member of a united Hindu family which would descend in a course different from that of a descent of a share of the property held in union. "Such a proposition," the Privy Council said, "is new, unsupported by authority and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in Macnaghten's Hindu Law,* where it is said as follows: 'According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words, if, at a general partition, any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.'

There need
not be unity
of heirship.

"Again, it is not pretended that, on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that, if the acquirer leaves male issue, it will descend as separate

property to that issue down to the third generation. Although, therefore, when there is male issue, the family property and the separate property would not descend to different persons,—they would descend in a different way, and with different consequences, the sons taking their father's share in the ancestral property, subject to all the rights of the co-parceners in that property, and his self-acquired property, free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear therefore, that, according to the Hindu law, there need not be unity of heirship.

“ But to look more closely into the Hindu law. When property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which, from its first acquisition, has always been separate? We have seen from the passage already quoted from Macnaghten's Hindu Law that, when a residue is left undivided upon partition, what is divided goes as separate property, what is undivided follows the family property,—that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and the interest in it.”

It follows, then, from this, that the right by survivorship depends both upon the *status* of the family and also the nature of the estate. It obtains only in joint families under Mitakshara law, and in regard to joint estate. If the estate has been self-acquired, there can be no right of the surviving co-parceners to take by survivorship. An impartible estate, however, may be joint as well as

Right by
survivor-
ship ex-
tremely
limited.

LECTURE
V.

separate. It is not the separate enjoyment but the separate title to which the law looks in deciding between the rival claim of the widow and the surviving co-parceners. The discussion brings out clearly and forcibly the slight degree in which the principle of succession by survivorship, the normal principle amongst communities like the Hindu joint family, still retains any influence over the devolution of property. It is treated by the Privy Council as one which merely tends to qualify the rule which gives the inheritance to widows; its operation is merely an exception to that of the ordinary law of Hindu inheritance, which in the time of Jimutavahana, was exclusively based upon religious doctrine, without any exception in favor of survivorship, regardless of the ordinary usage of the communal system.

Impartible
estate may
be joint
property.

Again, in the case of *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochi Venkondora*,* also decided by the Privy Council, it appeared that the general *status* of the family was that of an undivided family; and it was argued that the estate in question in the suit being impartible, must from its very nature be taken to be separate estate, and consequently that, according to the decision in the *Shivagunga case*, the succession to it was determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. The Privy Council, however, pointed out that the decision in the *Shivagunga case* proceeded solely and expressly on the ground that the zemindari therein referred to was proved to be the self-acquired and separate property of the last owner. The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession

* 13 Sutherland's Weekly Reporter, P. C., p. 21.

of separate estate. It must be borne in mind that the decision of the Privy Council in the *Shivagunga case*, rejecting the claim by survivorship in an undivided family, turned upon the separate self-acquired character of the estate, and not upon its impartibility. An impartible estate may be joint, as well as self-acquired. If the former, it will go by survivorship, under such circumstances as are still governed by the application of that primitive rule of succession.

In another case* which came before the Privy Council, the succession to an estate which was both impartible and also ancestral was in dispute. The plaintiff contended that the ancestral estate remained undivided. The Courts of this country held that the effect of a certain agreement which had been entered into was to effect a partition and to confer upon the zemindari in dispute the character of separate estate. But they added, "if it was not partible, and the brothers were, as the plaintiff contends, undivided at the brother's death, the widow would, according to the decision of the Privy Council in the *Shivagunga case*, be entitled to the whole estate, so that whether the plaintiff's own view, or that which we here take, is correct, the plaintiff is not entitled to succeed in this action." The Privy Council expressly pointed out that this view proceeded "upon a singular misapprehension of the *Shivagunga case*, which was this: the family was shown to be undivided, but the impartible zemindari was shown conclusively to have been the separate acquisition of the person whom succession was the subject of dispute. The ruling of this Court was that in that case the zemindari

* Raja Suranesir Venkata Gopala Narasunka Raj Bahadur v. Raja Suranesir Lakshmi Venbarna Raj, 3 B. L. R., P. C., 41.

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V.
—

should follow the course of succession as to separate property although the family was undivided, but if that zemindari had been shown to be an ancestral zemindari, the judgment of the Board would no doubt have been the other way."

Query
whether
females
originally
took by
survivor-
ship.

Succession by survivorship is therefore at the present day an exception to the ordinary course of legal inheritance, the rules of which are based upon the religious duty and efficacy of oblation and sacrifice. When, as in the case of failure of male issue of the deceased, it comes into competition with the right of the widow to succeed by inheritance, the survivor's claim is discussed, as one which merely tends in directly to qualify the widow's right. Yet it may even be questioned whether the right of the widow herself was not originally derived more from the notion of survivorship than from that of heritable right. The author of the *Dayabhaga* bases her right distinctly upon the authority of special texts, and it is admitted that her power to benefit her husband by funeral oblations is very limited.

The order of succession by inheritance amongst Hindus, though not strictly agnatic, favors the male line. The few women who are at the present day allowed to come in at all, do so upon some special grounds which are invented for the purpose. But according to Vrihaspati,* "in the Veda, in the written codes of law, and by the immemorial usage of men, the wife is declared by the wise to be half of the husband's body; sharing equally with him the fruit of good or bad conduct. As long as the wife lives, half his body is alive, though the other moiety may have perished; and while half of his body subsists, who else can inherit the wealth? Even though his kinsmen exist, his father, mother, and

* See a paper of Sir W. Jones, 2 Strange's Hindu Law, p. 251.

brother by both parents, yet if he die without male issue,—
i. e., males as far as the third degree,—his widow shall
 inherit his estate.”

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 V.
 —

It is, of course, of no practical importance whether she takes by survivorship, by the strictest rule of inheritance, or by the authority of a special text in her favor. Her position is clearly ascertained. But the fact remains, that when the lineal male heirs failed, the surviving males of the joint family succeeded; and if they failed, the surviving females, contrary to the religious principle now established, excluded the collateral and divided members. As the stringency of the family relationship relaxed, the principle of survivorship weakened, and a special text was a ready and convenient device for reconciling the claims of nature and duty with the established rules of inheritance, and for providing necessary exceptions to the male order of succession.

I may conclude with an extract from the judgment of the Privy Council delivered in the *Shivagunga case* to which I have already referred. “According to the principles of Hindu law,” they said, “there is co-parcenership between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family; and upon the death of any one of them, the others may well take by survivorship, that in which they had, during the deceased’s life-time, a common interest and a common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails, and there are no grounds for postponing

The Privy
 Council
 upon sur-
 vivorship.

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V.

the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

"Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together ; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe that the view which we have thus indicated of the Hindu law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

"A case may be put of a Hindu being a member of a united family having common property, being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first objection without insisting on the partition which, *ex hypothesi*, he is anxious to avoid."

LECTURE VI.

THE LAW OF SUCCESSION—LINEAL INHERITANCE.

General observations—The order of inheritance is determined with regard to the spiritual welfare of the deceased proprietor—Religious doctrines have dictated the law—Established by Jimutavahana—Their character—Lineal male succession—*Per stirpes*—Widow—Nature of her right to succeed—Limits of her right—Succession to the husband at her death—Rights of widows when there are more than one—Daughters—The Mitakshara and Dayabhaga on their right—Married daughters—Possession of a son gives no priority under the Mitakshara—Daughter's claim postponed under that law to the right by survivorship—Nature of the daughter's interest in her inherited estate—Under Western schools—According to the Bengal Courts—According to the Bombay Courts—Daughter's and widow's rights compared—Daughter's son—According to Mithila doctrine—Father and mother.

I HAVE endeavoured, in my last Lecture, to explain the extent to which succession by survivorship is still retained according to Hindu law and usages. If it may be conjectured that the continuity of the family was in the most primitive times unaffected by the death of the individual, and that the surviving members stepped at once into his place, it must, nevertheless, be allowed that, from the earliest period of which we have any historical record, there was an institution in existence which had a still stronger hold on the national mind than the sentiment which bound them together, in like manner as in other ancient societies, as families and as village communities. I refer to the institution of the *shraddha*, which, whatever may have been its

General observations.

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VI.

primitive significance, whether it was a ceremony by which the joint family did honour to some mythical ancestor, or whether it was resorted to as the sign and symbol of family union, nevertheless was in its true meaning and effect directly antagonistic to the exclusively communal principle. The notion of the family, as a corporate body, the continuity of whose existence was secured by births and adoptions, and was unbroken by the deaths of its members, co-existed with the doctrine that each individual member of that family was also bound by the tie of religious duty, and thence probably of heritable proprietary right with three of his dead ancestors, and three of his living or unborn descendants in their lineal order. It is obvious that the spirit and influence of such a union, cemented by the strongest motives of interest and duty, were in conflict with the principle upon which certain living persons were bound together by a community in food, worship, and estate, on the basis of a real or pretended blood relationship. I have already in last year's Lectures referred to the rules which regulate the performance of the *shraddha* as disclosing the principle upon which the proximity of family relationship is calculated, and its limits ascertained. I must now recur to them as disclosing the principle on which the latest system of succession by inheritance, which gradually displaced succession by survivorship, and the claims of blood relationship, is regulated.

There are, as I have already observed, several distinctions observable in the order of succession according to the school of Benares, and that which is ordained by the later school of Bengal. I shall, however, take the latter first, because, in the teaching of the *Dayabhaga*, the principle of succession of males, being based exclusively upon the duty of

performing the funeral obsequies, has finally overwhelmed and driven out the rival principle of succession by survivorship, and other ideas with which it conflicted. The five centuries which had elapsed since the promulgation of the treatise of the Mitakshara had served to develop that doctrine, and prepare the disciples of Jimutavahana to reject the last remnants of a contrary practice, and dissipate the confusion which, to the minds of some of the lawyers of the Benares school, still existed between the tie of connection by the *pinda*, and the tie of blood relationship.

I have already described the nature of the *pinda* connection, which denotes a relationship through giving, receiving, or participating in funeral oblations offered to a dead ancestor. All the schools of Hindu law which exist in India, acknowledge the religious duty of presenting those oblations, point out the kindred on whom that duty rests, and clearly define the principle upon which the graduated scale of the *pinda* relationship is calculated. "And the Hindu law of inheritance, in the widest acceptation of the term, is essentially based upon considerations relating to the spiritual welfare of the deceased proprietor. All the ancient Rishis, or Hindu sages, whose texts are regarded as the fundamental source of Hindu law, and all the commentators on it whose opinions are recognized as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not their exclusive, guide."*

The order of inheritance is determined with regard to the spiritual welfare of the deceased proprietor.

The doctrine of Jimutavahana (and he is followed by other commentators whose authority is current in Bengal) was that, by considerations of spiritual benefit alone, the whole order of succession to be determined. "Two

Religious doctrines have dictated the law.

* 5 Bengal Law Reports, p. 34, per Dwarkanath Mitter, J.

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motives," he says, "are indeed declared for the acquisition of wealth; one temporal enjoyment, the other the spiritual benefit of alms, and so forth.* Now, since the acquirer is dead, and cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit." He then quotes texts of Vrihaspati and Apastamba to the effect that at least half the inheritance should be set apart for the benefit of the deceased owner. Passing from these texts, he argues that, when those kindred who might present oblations in which the deceased would participate fail, then the succession should devolve on those who present oblations which the deceased would himself have offered. Menu,† he points out, had emphatically declared:—"To the nearest sapinda the inheritance next belongs." That the sapindaship here meant is the tie of the *pinda* which connects three generations in ascent and three in the descending scale with the living proprietor, is shown by the direction contained in the preceding verse of Menu, who, while treating of inheritance, specifies the fourth in descent as the giver of those oblations, and distinctly excludes the fifth in descent from being heir, because he is not connected by a single oblation; excludes him, that is, so long as a person connected by a single oblation, whether sprung from the father's or the mother's family, exists.

Established
by Jimuta-
vahana.

Whatever doubts may formerly have existed as to the principle upon which the order of succession to the estate of a deceased man should be regulated, there can be none whatever as to the doctrine and teaching of Jimutavahana. He denies in express terms that Menu's text—"to the nearest sapinda the inheritance next belongs"—was ever in-

* Dayabhaga, Chap. XI, Sec. VI, verse 13.

† 9 Menu, verse 187.

tended by the great lawgiver himself to indicate nearness of kin according to the order of birth.* He arrives at the definite conclusion, arguing, from the recorded sayings of the founder of Hindu law, that the order of succession must be obtained by discriminating kinsmen according to the degrees of their proximity in their alliance by common oblations.† For it is reasonable, he adds, that the wealth which a man has acquired should be made beneficial to him by appropriating it according to the degree in which services are rendered to him.

I wish to add to what I have already said a quotation from a judgment of Mr. Justice Dwarkanath Mitter, who has, on several occasions, elucidated from the Bench of the High Court of Bengal several leading points in the Hindu law of inheritance. The judgment from which the following quotation is made was delivered in the case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar*.‡ Speaking of the order of succession to be followed when different persons are claiming the same estate by right of inheritance, he says :—“ It is beyond all dispute that the whole of that portion of the Dayabhaga which is devoted to the subject, is nothing but a mere elaboration of the doctrine of spiritual benefit. Every point for which a discussion is thought necessary is ultimately determined by that doctrine ; and it is by that doctrine that every difficulty is ultimately removed. The texts of Menu and various other Hindu sages are frequently cited, it is true, as the highest authorities on Hindu law ; but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted,

Their
character.

* Dayabhaga, Chap. I, Sec. VI, verse 18.

† Verse 19.

‡ 5 Bengal Law Reports, p. 36.

LECTURE VI. and it is by that light that every discrepancy existing between them is reconciled."

The right* of succession, therefore, according to the author of the Dayabhaga, is distinctly founded on competence for offering funeral oblations at the obsequies of the deceased proprietor.

Lineal
male
succession.

The first rule which results from this principle is in the language of Menu†:—"Not brothers, nor parents, but sons if living, or their male issue, are heirs to the deceased; but of him who leaves no son, nor a wife, nor a daughter, the father shall take the inheritance; and if he leave neither father nor mother, the brothers." The inheritance therefore descends lineally, in the first instance, to sons, grandsons, and great-grandsons. If more than one son, they take in equal shares; but if a son has pre-deceased his father, his share is taken by the grandson or great-grandson, as the case may be.

Per stirpes. Lineal succession is *per stirpes*, and not *per capita*. For, "since‡ benefits are derived from the great-grandson, as well as from the son, the term son extends to the great-grandson; for as far as that degree, descendants equally confer benefits by presenting oblations of food in the prescribed form of half-monthly obsequies."

The next rule is also in the language of Menu§,—“To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs.” This points to collateral succession; but before we reach that branch of the subject, there are other persons in the direct line of the deceased, whose position in the order of succession must be ascertained. These are the widow, the daughter, the daughter's son, the father, and the mother.

* Dayabhaga, Chap. II, Sec. †, verse 40.

† 9 Menu, verse 185.

‡ Dayabhaga, Chap. XI, Sec. †, verse 34.

§ 9 Menu, verse 187.

Now, with regard to the wealth of a man who dies, leaving no male issue, Vrihaspati declares that the widow has the preferable title before either parents or collaterals. He apparently insists upon her right by survivorship. Yajna-
LECTURE VI.
Widow.
 valkya and Vishnu are quoted in support of that theory; and all the authorities agree that the widow's right under such circumstances extends to the whole estate.

With regard to the passages from Sancha, Lichita, Devala, and others, which apparently place the right of the brothers before that of the widow, the author of the Daya-bhaga rejects the interpretation which is resorted to for the purpose of reconciling conflicting texts; which is, that the associated brother should take in preference to the widow, who in turn takes in preference to the separated brother. Such a mode of reconciling contradiction is, he says, unsupported by positive texts, and not deduced from reasoning. He denies that associated brethren take by survivorship; he says that property is referred severally to unascertained portions of the aggregate. Each of the parceners has not a proprietary right to the whole. Nor is there any proof of the position that the wife's right in her husband's property, accruing on her marriage, ceases on his demise; but the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue.

The widow's place, therefore, in the order of succession is in the Dayabhaga based upon the principle of spiritual benefit. She is postponed to sons, grandsons, and great-grandsons, because she performs acts spiritually beneficial to her husband from the date of her widowhood, and not like them from the moment of birth. But she succeeds, failing male issue, because she "rescues her husband from
Nature of her right to succeed.

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case of landed property devolving on a woman by the death of her husband, the right of her husband's heir begins to accrue from the date of the death of the widow, not from the date of the death of her husband; consequently of the husband's heirs, they only can be entitled to the inheritance who are living at the time of the widow's death. The right of him who dies during her life-time is entirely forfeited, and cannot devolve on his son. Although there is some difference between the Hindu law as current in Purneah, and the rest of Bengal, yet there is no difference of opinion on this point, all agreeing that a widow succeeds in default of a son, grandson, and great-grandson; and although the widow is restricted from transferring the property, yet she is clearly an heir, and has an indefeasible right of succession." The pundits referred to in this case, after re-consideration, stated that the younger brother of the widow's husband succeeds to the property which had devolved on her, and the son of the deceased elder brother is not entitled to any portion of it. The rule, therefore, according to the Bengal school, is that, when a man dies leaving no male issue, the right of inheritance accrues consecutively first to the widow, next to the daughter, next to the daughter's son, then the father, then the mother, then the brother, then the brother's son, and so forth; and so long as one holding the prior right exists, the right of him whose claim is posterior cannot come into operation.

Rights of
widows
when there
are more
than one.

I have* already discussed the question of the rights of widow, when there are more than one. It has, however, been said to be a moot point whether, under the Mitakshara law, the elder widow receives the whole estate, the

* See Vol. I, Lecture VIII, p. 204.

younger widow receiving maintenance out of it, or whether the rights of widows are equal.* LECTURE
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In default of the widow, the daughters inherit. Menu Daughters. and Nareda† say:—"The son of a man is even as himself; and the daughter is equal to the son; how, then, can any other inherit his property, notwithstanding the survival of her, who is as it were himself?" She inherits, because equally with the son she is "a cause of perpetuating the race;" that is, as the author of the Dayabhaga is careful to explain, "such descendants as present funeral oblations."

The author of the Mitakshara, although he bases the right of daughters' sons to succeed on the ground that they are considered as sons' sons, in regard to the obsequies of ancestors, does not refer the heritable right of the daughter herself to any spiritual benefit. He quotes a special text of Vrihaspati,‡ which apparently bases that right upon relationship; "as a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" It was because the daughter can confer great spiritual benefit on her father by giving birth to a son, who will deliver him and his ancestors from hell, that Jimutavahana§ restricted the right of inheritance to one who is mother of male issue, or is likely to become so; and excluded the childless widow, the barren, or the mother of female issue only. It was for the same reason that he gave priority over her sisters to the maiden daughter, because her marriage might otherwise be delayed on account of her indigence beyond the

* Judoobunsee Koer v. Girblurun Koer, 12 S. W. R., p. 158.

† Dayabhaga, Chap. XI, Sec. II, verse 1.

‡ Mitakshara, Chap. II, Sec. II, verse 2.

§ Dayabhaga, Chap. XI, Sec. II, verse 3.

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age of puberty, and thus the salvation of her father's soul, and of that of his ancestors, be brought into peril. The Mitakshara* also gives priority to the maiden daughter, simply on the ground of a special text of Catyayana, "in default of the widow, let the daughter inherit, if unmarried." If, however, the competition† be between an unprovided and an enriched daughter, the unprovided one inherits; but on failure of her, the enriched one succeeds.

Married
daughters.

It was ruled in a case‡ decided by the High Court of Bengal that, whether the succession be governed by the law of Bengal or by that of Benares, married daughters are not excluded from the succession. By the law of Bengal, unmarried daughters are first entitled to inherit. If there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession. Daughters who are barren, or who are widows without male issue, or who are mothers of daughters only, cannot, under any circumstances, inherit. By the law of Benares, also, preference is given to the maiden daughter. Failing her, the succession devolves on the married daughters who are indigent, to the exclusion of wealthy daughters. The latter, however, succeed in default of indigent daughters, but no preference by that law is given to a daughter who has, or who is likely to have, male issue, over a daughter who is barren or a childless widow.

Possession
of a son
gives no
priority
under the
Mitakshara.

Further, in the case of *Bakubai v. Manchabai*,§ it was held by the High Court of Bombay that, as between two

* Chapter II, Sec. II, verse 2.

† Verse 4.

‡ *Binode Koomaree Debia v. Purdhan Gopal Sahee*, 2 S. W. R., p. 176.

§ 2 Bombay H. C. Reports, p. 5.

married daughters, the fact of one of them having a son does not in Western India give to that one a prior claim to inheritance of her parent's property over her sonless sister. The Mitakshara and the Mayukhu were considered to be clear authorities that the test of sonship as between married daughters must be disregarded in Western India. The rule there is that, as amongst daughters, succession to their father's estate must be regulated by their comparative endowment or non-endowment.

In a later case* before the same Court, it was contended that a daughter with a son had a preferential claim to succeed to her father's estate over a daughter who was a childless widow. The decision above cited was considered to settle the point definitely. The circumstance of having male issue does not in Western India determine the right to inherit as between daughters. The only principle is that an unendowed (*nirdhan*) daughter has preference over an endowed (*sadhan*) daughter.

It must, however, be remembered that, under the Mitakshara law, the principle of survivorship amongst males in a joint family will operate to the exclusion of the daughter, as well as of the widow. If a separated brother dies, his widow, and then his daughter, takes in preference to his brothers, and next in order to male issue. But if the deceased were joint with his brethren, they would take the joint estate. The daughter, like the widow, would only succeed to the separate property of the deceased proprietor.†

Daughter's claim postponed under that law to the right by survivorship.

In an early case,‡ decided by the Bengal Sudder Court, a dispute as to succession arose on the death of a Hindu

* *Poli, widow, v. Narotum Baba*, 6 Bombay H. C. Rep., A. C. J., p. 183.

† *Koolodah Debiah v. Ramjotee Debiah*, 12 S. W. R., p. 453.

‡ *Sheo Sehai Singh v. Muasamat Omed Konwur*, 6 S. D. R., p. 301.

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woman, who had inherited the whole estate, the subject of dispute, from her father as his sole surviving child, her sister and her brother having both pre-deceased her father. The claimants to the estate were on the one side the son's sons of her sister; on the other side her own daughter, who was her only surviving child. The case was governed by the Hindu law as current in Behar. The Zillah Judge dismissed the claim of the former. The pundit of the Calcutta Sudder Dewanny, having clearly ascertained that the property in dispute was ancestral, stated that, though the law did not generally recognize the right of a sister's son's son, yet, if there were no nearer heirs to the original proprietor, his right might be admitted under the authority of the following text in the Niruna Sindhoo. Text of Vishnu:—"If a person die, leaving no nearer heir, then his daughter's son, and after him, his daughter's son's son, should perform the funeral obsequies of the deceased." He said that the above text of Vishnu was applicable either in the case of a daughter's son, or a daughter's son's son. The Sudder Court decreed in favor of the sisters' sons' sons, declaring that they would inherit *per capita*, and not *per stirpes*. The main reason for the decree apparently was the alleged impossibility, according to Hindu law, of a daughter succeeding to ancestral property inherited by her mother. Sister's son's sons, it is said in a note to the case, are very distant indeed in the order of succession; and in fact are excluded from the list of heirs by almost all the Hindu legal authorities.

Nature
of the
daughter's
interest
in her
inherited
estate.

With regard to the nature of the interest* which the daughter takes by inheritance in her father's estate, it is in the Bengal school according to Mr. Macnaghten as

* See *ante*, p. 31.

limited as that of the widow. In an early case* it was held that the daughter was incompetent to alienate by gift the ancestral property which she held, to the detriment of the other heirs of her father. The pundits of the Sudder Court of Bengal declared that, according to the Mithila and Western schools of law, "when a person dies, leaving no male issue, the widow who succeeds to his estate, has no right to alienate any part of it, except for religious purposes; and, therefore, the daughter whose right of inheritance is weaker—that is, who only succeeds on failure of the widow—can have no such right. * * *

For, as in the case of the widow, the property goes on her decease, not to her heir, but to the nearest heir of her husband who may then be living, so the same rule is to be observed *a fortiori* as regards the daughter." The pundits also pointed out that the Western school of law considers the daughter's son to be an heir; but that he was not acknowledged as such by the Mithila school, which considers that the nearest sapinda of the father is the next heir after the daughter. Their view of the law was, however, subsequently over-ruled.†

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VI.

Under
Western
schools
according
to the
Bengal
Courts.

In the case of *Pranjivandas Tulsidass v. Devkuvarbai* which arose in the late Supreme Court of Bombay, it was held that, according to all the authorities, the daughters take next after the widow. Chief Justice Sause said:—"What, then, is the nature of the estate they take? Here, again, there are differences of opinion; but dealing with the question according to the three books I have mentioned,—i. e., Menu, the Mitakshara, and the

According
to the
Bombay
Courts she
takes an
absolute
estate.

* *Mussamat Gyan v. Dookhurn Sing*, 4 Select Reports (new edition), p. 420.

† See *post*, p. 134.

‡ 1 Bombay High Court Reports, O. C. J., p. 130, 2nd edition.

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Vyavahara Mayukhu,—it appears to me that the daughters take an absolute estate. We find quoted in the Mayukha* a passage from Menu:—‘The son of a man is even as himself, and the daughter is equal to the son; how, then, can any other inherit his property but his daughter, who is, as it were, himself?’ With reference to this point also I consulted the Shastris, both here and at Puná, and enquired whether daughters could alienate any, and what portion of the property inherited from a father who died separate. The answer was that daughters so obtaining property, could alienate it at their will and pleasure, and in this the Shastris of both places agreed, both also referring to the above text in the Mayukhu as their authority for that position. On reviewing all accessible authorities, I have come to the conclusion that daughters take the immoveable property absolutely from their father after their mother’s death.’

Daughter’s
and
widow’s
rights
compared.

Although a daughter, as a general rule, takes as limited an interest as a widow, yet it is not in all respects the same. I have already shown how the principle of survivorship obtains amongst widows of the same man; and that, although they may in their life-time divide the enjoyment, they cannot divide the title to the estate of their husband. They cannot defeat or vary the right of the reversioners, which is that of succession to the whole estate at the death of the last survivor. But amongst daughters the doctrine of representation obtains, although it is not quite clear upon the authorities to what extent. If all the daughters pre-decease the father, then it seems that the daughters’ sons will take *per capita*, and not *per stirpes*. At least so it was held in an early case† upon the subject.

* Chap. IV, Sec. VIII, para. 10.

† Ramdhone Sein v. Kishenkant Sein, 3 Select Reports (new edition) p. 133.

Such a ruling is scarcely consistent with the notion of daughters separately taking equal shares, which they respectively transmit to their sons. Again, there is an opinion of the pundit of the Calcutta Sudder Court, reported in an early volume,* which apparently favors the theory that a sister succeeds sister as heiress, and not as widow succeeds widow by survivorship. He stated that two maiden daughters having succeeded to equal shares in their father's property, and one of them having subsequently died a childless widow, the other, according to Hindu law, succeeded to the deceased sister as heir to her father. She was held to do so, in that case, in preference to her father's brother's son.

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VI.

Most certainly the right by survivorship as between daughters does not extend to the case where, according to Bengal doctrine, the unmarried daughter takes the whole of her father's estate in preference to her married sisters. For if, after the vesting of the estate, she should marry, and have a son and then die, that son, it has been held,† will succeed to her. His title will prevail over his mother's sisters and their sons; those sisters having been married at the date of their father's death.‡

If, therefore, a daughter die leaving a son, that son will take his mother's share in preference to her sisters.

It is distinctly laid down in the Dayabhaga: §—"It is the daughter's son," says Jimutavahana, "who is the giver of a funeral oblation, not his son; nor the daughter's daughter; for the funeral oblation ceases with him." Lineal suc-

* Rai Sham Ballabh v. Frankishen Ghose, 5 S. D. R., p. 21.

† Radhakishen Manjhee v. Rajah Ram Mundul, 6 S. W. R., p. 147.

‡ See Shamachurn's Vyavastha Darpana, pp. 23, 147; Dayabhaga, Chap. II, p. 30.

§ Chap. XI, Sec. II, verse 2.

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cession through a daughter therefore terminates with a son ; her daughter and her son's son are rigidly excluded. They are not of the same *gotra* with her father ; neither are they his *sapindas*. If the daughter has no son, then upon her death, or the death of the last surviving daughter, without male issue, the next reversionary heirs of the father succeed. With regard to the daughter's daughter succeeding, that is regarded as wholly impossible.

According
to Mithila
doctrine.

But with regard to the daughter's son, many ancient texts clearly place him next in succession after failure of male issue, and of the widow and of the daughter. It was doubted at one time whether his title to succeed was recognized by the authorities of the Mithila school. The question was discussed in a case* reported by Mr. Sutherland, which arose in the Zillah Court of Tirhoot, whether, by the Hindu law there received,—i. e., according to the Mithila school,—the agnate kin of a deceased Hindu excluded his daughter and his daughter's son from the inheritance. The pundit of the Provincial Court said that, "on the death of the widow who succeeded to her husband's estate, the distant sapinda kinsmen are the reversionaries, and exclude a daughter and daughter's son ; for their competence to inherit and perform the exequial rites of the deceased is declared to be after such competence of the distant kin in the male line. Such also is the practice of the Mithila country ; division or non-division makes no difference."

And in support of that opinion, the pundit, it is stated, cited texts of Vrihaspati and Catyayana to the effect that, on the death of the widow who succeeded to her husband's estate, it reverts to his heirs ; also, the Mitak-

* Surja Kumari v. Gandhrap Singh, 6 S. D. R., p. 142.

shara text of Yajnavalkya, which recites the order of heirs; and also a text which recognizes the validity of established local usage. The Judge of the provincial Court decreed in favor of the daughter, but excluded the daughter's son, declaring that he had no interest in the estate of his maternal grandfather. He rested his opinion chiefly upon the statement of Sir Wm. Macnaghten,*—viz., "the right of daughters' sons is not recognized in the Mithila school." In decreeing in favor of the daughter, the Zillah Judge restricted her interest to an enjoyment for life, and expressly ruled that the rever-
LECTURE VI.
 sionary heirs were the agnate kin of her father, to the exclusion of her son.

In appeal, the Sudder Court pundit stated that in the Kalpataru, the Madana Parijata, and the Smriti Sara, with regard to the estate of a man who has died without male issue, the daughter's son is mentioned as the heir next to the daughter who follows the wife; but in the Vivada Chintamoni and the Vivada Ratnakara, the daughter's son is not mentioned. The Supreme Court pundit argued that it was the intention of the authors of the Vivada Ratnakara, Vivada Chintamoni, and other Mithila works, to place the daughter's son next to the father. The decree of the Sudder Dewanny Adawlut was in favor of the succession of the daughter's son. The substance of the reasons stated is as follows:—"The Vyavastha of the pundit establishes the preferable right of a daughter's son. The texts of Vishnu, Vrihaspati, and Menu are conclusive on this point. In other texts, the daughter's son is not expressly mentioned, but his exclusion from succession, contrary to the express sanc-
Decision of the Sudder Court of Bengal.

* Principles of Hindu Law, Vol. I, p. 23.

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VI.

tion of the majority of authorities in his favor, cannot be established by the omission. The texts too in which he is omitted seem vague, and construed with reference to other texts or correct readings may be reconciled. The translations of Mr. Colebrooke show that by approved texts the married daughter and maiden daughter are preferred as heirs to the widow daughter: the ground of this preference is that the two former may have sons who will benefit their maternal grandfather by the performance of rites. It seems then absurd to hold that an existing daughter's son should be excluded, when his probable birth even would be ground of preference to be shown to his mother."

The Madras High Court, also, has held* that a daughter's son is one of the nearer sapindas, and is in the line of heirs before a brother's son.

Of the
High Court
of Bombay.

The Bombay High Court has also held† that daughters' sons succeed next after daughters. A Hindu died, possessed of self-acquired property in land, but without male issue. He left a widow and two daughters only, by his widow, and the other by an elder wife, deceased. The last-mentioned daughter died in the widow's life-time, leaving two sons. The question was whether the doctrine of representation, which in Hindu law undoubtedly prevails in the case of sons, also prevails in the case of daughters.

The widow, of course, succeeded on the death of her husband. On her death, the daughters would have succeeded, if both had been living, and the question was whether, as one daughter was dead, her sons represented her, and took a moiety, or whether the surviving daughter took the whole.

* N. Krishnamma v. N. Papa, 4 Madras H. C. Reports, p. 234.

† Jamiyatram v. Bai Jamna, 2 Bombay H. C. Reports, p. 10.

The Court said: "The widow in Western India has only a particular estate for life in the immoveable separate property of her deceased husband. It follows from this that, when a separated Hindu dies, leaving landed property, and no son or son's son, his widow on his death takes for her life; and the daughters on his death, subject to the widow's life-estate, take an estate in remainder, vested immediately in interest, but not coming into the possession of themselves or their sons, as the case may be, until after the death of the widow.

"Then is there any rule which prevents the doctrine of representation from taking effect in the case of sons of daughters, as well as in the case of sons of sons?"

"The principle on which a daughter inherits is thus stated by Menu*:—'The son of a man is even as himself, and the daughter is equal to the son; how then can any other inherit his property, notwithstanding the survival of her who is, as it were, himself?' So Vrihaspati (as cited in the Mitakshara)†:—'As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?'

"The principle on which the son of a daughter inherits is thus stated by Menu:—'By that male child whom a daughter,‡ whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation, and possess the inheritance.' To the same effect is Vishnu:—'If a man leave neither son, nor son's son (nor wife, nor female issue),§ the daughter's

* 9 Menu, verse 130.

† Chap. II, Sec. II, verse 2.

‡ 9 Menu, verse 136.

§ Balam-bhatta.

LECTURE VI. son shall take his wealth. For, in regard to the obsequies of ancestors, daughters' sons are considered as sons' sons.* It thus appears that, as in Hindu law daughters' sons are considered as sons' sons in respect of their spiritual relation to their deceased ancestor, so they must be regarded as equally entitled with sons' sons to avail themselves of the right of representation, which in Hindu law, like the very right of inheritance itself, is ultimately founded on the principle of service to be performed to the ancestor in relation to his funeral obsequies, with a view to his spiritual welfare."

The result is that daughters' sons are universally recognized as heirs. They succeed to the share of their mother as her representatives, in a manner which is totally distinct from that of reversioners' succession after the death of a widow.

Father and
mother.

The right of succession through the daughter terminates with her son; and therefore, on failure of daughters' sons, the list of heirs in the descending heir is exhausted. In order to ascertain the next heir, Jimutavahana again resorts to the theory which runs through the whole of his work. He says†:—"The father's right of succession should be after the daughter's son, and before the mother; for the father offering two oblations of food to other manes in which the deceased participates, is inferior to the daughter's son, who presents one oblation to the deceased, and two to other manes in which the deceased participates; he is preferable to the mother and the rest, because he presents personally to others two oblations in which the deceased participates."

* Mitakshara, Chap. II, Sec. II, para. 6; and see Stokes, H. L. Bks., p. 441, note.

† Dayabhaga, Chap. XI, Sec. III, verse 3.

The mother's claim to succeed, if the father be dead, is based upon the benefits which she confers upon her deceased son by the birth of other sons (his brothers), who may offer funeral oblations in which he will participate.

The author of the Mitakshara, on the other hand, is less influenced by the doctrine of spiritual benefit, and discusses the question of succession, with reference to proximity in blood relationship. He says* :—" The father is a common parent to other sons, but the mother is not so ; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance." " Therefore,† since the mother is the nearest of two parents, it is most fit that she should take the estate. But on failure of her, the father is successor to the property."

* Mitakshara, Chap. II, Sec. III, verse 3.

† Verse 5.

LECTURE VII.

COLLATERAL AND REMOTE SUCCESSION.

- General observations—Brothers—The whole and half blood—Associated half brethren and separated whole brethren—Difference in blood does not affect the succession to joint estate—Ruling of the High Court of Bengal—Under the Mitakshara—Brothers' sons—Sons of whole brothers exclude sons of half brothers—Sisters—Brothers' grandsons—Father's daughter's sons—The descendants of the grandfather—Of the great-grandfather—Bandhus—Principle upon which priority of succession is regulated in the Dayabhaga—Sapindas—Saculyas—Samanodakas—Remote succession—Doctrine of the Privy Council—Of the High Court of Bengal—The Dayabhaga—Remote succession, according to the Mitakshara Ruling of the Madras High Court—Ruling of the Bengal High Court.

General
observa-
tions.

THE explanation given by the author of the Mitakshara, for preferring the mother to the father in the order of succession, serves to illustrate the manner in which the claims of blood relationship occasionally in that treatise vary the order of succession which an exclusive attention to connection by the *pinda* would have dictated. It was originally considered that the relation of sapinda was twofold,—viz., through consanguinity and connection by funeral oblations.* In later times, at least for purposes of inheritance, the relationship denoted by the word "sapinda" is that of connection by the funeral cake,—i. e. the relationship between those who give, receive, and participate in the same funeral offerings.

Brothers.

Passing from the immediate parents, the next heir, according to the Dayabhaga, is the brother. While the inheritance was descending in the direct line, the doc-

* Dattaka Mimansa, Sec. VI, verse 32.

trine of successive representation obtained ; for the grandson through a predeceased son confers equal benefits with a son, and accordingly takes an equal share with a surviving son. In collateral succession, however, the case is different ; and although equality of division is still the rule, those in the same degree, divide the inheritance, regardless of those in the next degree, who, if the inheritance had been descending in the direct line, would have stepped into the places of their respective fathers. The surviving brothers take the whole estate between them, to the exclusion of the sons of their deceased brothers.

The reason is again drawn from the principle upon which Jimutavahana uniformly insists,—viz., that the order of succession is regulated by the degree in which spiritual benefits are conferred. “The brother,” he says,* “confers benefits on the deceased owner by offering three funeral oblations to his father and other ancestors in which the deceased participates ; and he occupies his place as presenting three oblations to the maternal grandfather and the rest, which the deceased was bound to offer ; and he is therefore superior to the brother’s son, who has not the same qualifications.” A nephew,† whose father is living, is excluded, because until his father’s death he is incompetent to offer oblations ; a nephew, whose paternal uncle is living, is excluded, because such uncle can confer greater benefits.

Amongst brothers, however, there may be those of the whole blood, and those of the half blood ; those who were associated with the deceased at the time of his death, and those who were separate from him. The preference is given to

The whole
and half
blood.

* Dayabhaga, Chap. XI, Sec. V, verse 3.

† *Ibid*, verse 6.

LECTURE
VII.

those of the whole blood, for they offer three oblations to the paternal ancestors and three to the maternal ancestors which the deceased was bound to offer; while those of the half blood only offer oblations to the same paternal ancestors as the deceased. The brothers of the half blood, however, take precedence of the sons of brothers of the whole blood, in consequence of their offering three oblations in which the deceased participate; while the brothers' sons only offer two. Finally, if the union by blood be equal, then union by coparcenary will confer priority over the separated brother.*

Associated
half
brethren
and
separated
whole
brethren.

A discussion is raised in the Dayabhaga whether the associated half brother and the unassociated whole brother do not stand upon the same footing with regard to the succession to a deceased owner. Sricaramisra is quoted, who conducts his discussion of the texts to the conclusion that while a brother of the whole blood exists, the half brother cannot succeed. But Jimutavahana cites a text of Menu†: “his uterine brothers and sisters, and such brothers as were re-united after a separation, shall assemble together and divide his share equally.” Therefore, he argues, it is from mere ignorance that it has been asserted that both descriptions of brethren—viz., uterine brothers and re-united half brothers—do not inherit together; and he quotes also a text of Yama, “the whole of the undivided immoveable estate appertains to all the brethren, but divided immoveables must on no account be taken by the half brother.” Hence, he says, if there be competition between claimants of equal degree, whether brothers of the whole blood or brothers of the half blood, the re-united parcener shall take the heritage.

* Dayabhaga, Chap. XI, Sec. V, verse 13.

† 9 Menu, p. 212.

Mr. Macnaghten* says that the order in which brethren inherit is—(1) the uterine associated brethren; (2) the unassociated brethren of the whole blood; (3) the associated brethren of the half blood; (4) the unassociated brethren of the half blood. But if a man die leaving a uterine brother separated, and a half brother associated or reunited, these two will inherit the property in equal shares.

When, however, the brethren hold undivided immoveable estate, in that case, on the death of one of them without nearer heirs, the others divide his share irrespective of difference in blood. The text of Yama above cited is the authority for that proposition. The rule was followed by the High Court of Bengal in the case of *Teeluck Chunder Roy v. Ram Luckhee Dossee*,† in which the equal succession of uterine and half brothers was decreed.‡ Again, in a later case,§ where there were two brothers by one wife and two by another, and one had died without issue, the three surviving brothers, who at the time of his death were undivided in estate, were held entitled to succeed equally to his share.

The question was discussed by the High Court of Bengal, whether, according to Hindu law of the Bengal school, the brothers of the half blood would take equally with brothers of the whole blood any property left by one of their number; and if so, whether the same principle would apply to nephews. The appellants, in the case|| referred to, on whom lay the affirmative of those propositions, and the respondents who asserted the preferential

* Principles of Hindu Law, p. 26.

† 2 S. W. R., p. 41.

‡ See also 2 Macnaghten, p. 66; and Colebrooke's Digest, B. V, Chap. VIII, verse 431.

§ Shibnarain Bose v. Ramnidhee Bose, 9 S. W. R., p. 87.

|| Kylas Chunder Sircar v. Gooroo Churn Sircar, 3 S. W. R., p. 43.

Difference
in blood
does not
affect the
succession
to joint
estate.

Ruling of
the High
Court of
Bengal.

LECTURE
VII.
—

right of the brothers of the whole blood both referred to the old authorities—the respondents, however, having in their favor the following passage from Macnaghten and Elberling:—"In default of father and mother, brothers inherit—(1) the uterine associated brethren, (2) the un-associated brethren of the whole blood, (3) the associated brethren of the half blood, and (4) the unassociated brethren of the half blood." The Court observed the great *prima facie* conflict of authority, but held that the texts adduced by the respondent showed that the preferential right to succession by brothers of the whole blood depended altogether on the nature of the estate; and that from them it appeared that uterine brothers have no larger right than brothers of the half blood when the property is undivided and immoveable; and this interpretation the Court said was consonant with reason and natural law. "The property being ancestral and undivided, the deceased brother's share represents something that descended to him from his father, and was not acquired by any exertions of his own. It was emphatically the father's property; and as all the brothers, both uterine and of the half blood, stood in the same degree of relationship to the original owner of the property, it is but reasonable that any part of that property which circumstances may cause to be divided, should be apportioned equally amongst all the sons."

Under the
Mitakshara.

According to the Mitakshara,* brethren share the estate on failure of the father. The order assigned to them is that such as are of the whole blood take the inheritance in the first instance, and on failure of them, then those by different mothers. Priority between them is determined

* Chap. II, Sec. IV, verse 1.

by the text*: "to the nearest sapinda the inheritance next belongs;" which is again explained in a manner which shows that blood relationship, and not connection through the funeral cake, was the notion present to the mind of the author.†

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VII.

In default of brothers, brothers' sons inherit in the same order. They take according to numbers, and not by representation,—that is, *per capita*, and not *per stirpes*.‡

Brothers'
sons.

Brothers' sons are totally excluded by the existence of brothers, whether of the whole or of the half blood; but failing the brothers each nephew offers two oblation cakes to the father and grandfather of the late owner. There is, therefore, no priority of any one of them over the others; they share equally.

Then with regard to the inheritance of the brothers' sons, upon the question of the whole or the half blood, the High Court of Bengal§ has ruled that there was no analogy between whole and half brothers on the one side and their respective sons on the other; and that all the authorities were agreed that when the succession devolves on nephews, the sons of the whole brothers peremptorily excluded the sons of the half brothers. The reason is, as given in the *Dayabhaga*,|| that the son of the half brother gives oblations to the father of the late owner together with his own grandmother, to the exclusion of the mother of the late owner; he is therefore inferior to the son of the whole brother who gives oblations to both the father and the mother of the deceased proprietor.

Sons of
whole
brothers
exclude
sons of
half
brothers.

I may here add that the pundits of the Sudder Court of Bengal, in a case¶ decided in 1824, pointed out that,

* Chap. II, Sec. V.

† See S. W. R., p. 223.

‡ *Brojo Kiasoree Dossee v. Srinath Bose*, 9 S. W. R., p. 464.

§ *Kylas Chunder Sircar v. Gooroo Churn Sircar*, 3 S. W. R., p. 43.

|| Sec. VI, para. 2; and see *Mitakshara*, Chap. II, Sec. IV, verse 7.

¶ *Mussamut Jymnee Debiah v. Ramjoy Chowdhree*, Select Reports (new edition), Vol. III, p. 385.

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according to the Hindu law as laid down by the authorities current in Bengal, when a widow dies leaving a brother of her husband and the widow and sons of another of his brothers, the surviving brother is exclusively entitled to her husband's estate. Further, the widow of her husband's brother is not, under any circumstances, recognized as an heir to her husband.

Sisters.

With regard to sisters, they are not enumerated in the order of succession either in the Dayabhaga or in the Mitakshara. Moreover, it has been consistently held by the Courts that she does not succeed to her brother.* But in the Mitakshara† there is a note of Mr. Colebrooke's to the text of Menu authorizing the succession of brethren, which states that both Nanda Pandita and Balam Bhatta consider that text as intending "brothers and sisters;" in the same manner in which parents have been explained by the author to mean mother and father, conformably with an express rule of grammar. The two commentators referred to observed that the brother inherits first, and in his default the sister. Their opinion, however, is stated to be controverted by Kamalakara and by the author of the Vyavahara Mayukha.

But the authority of the Vyavahara Mayukha,‡ at all events, is distinctly in favor of the sister's right to inherit next in order after the paternal grandmother. And in the case of *Venayek Anundrow v. Luxoomeebaee*,§ the Privy

* Amongst other cases, see *Ramdial Deb v. Musst. Magnee*, 1 S. W. R., p. 227; 2 Macnaghten, p. 107; *Raj Koomaree Kirpa Mayee Dibeah v. Rajah Damoodhur Chunder Dey*, 7 S. D. R., p. 192; and *Anund Chunder Mookerjee v. Teetaram Chatterjee*, 5 S. W. R., p. 215.

† Chapter II, Section IV, verse 1.

‡ Chapter IV, Section VIII, verse 19.

§ 3 S. W. R., P. C., p. 41.

Council held that in Bombay sisters are heirs to their deceased brother in preference to his nephews. They observed that different views of the law with regard to the capacity of sisters to be heirs to their brother appear to have been taken in different parts of India: that a general leaning in favor of excluding the sister appears to prevail in Bengal, but not in Bombay. There is a case, however, in the Select Reports, in which a pundit of the late Sudder Court of Bengal declared that a sister is entitled to enter on the succession and hold until production of her male issue. He based his opinion upon the doctrine that a sister is a source of production of daughters' sons to the father, and the medium of their relationship. He drew an analogy between her position and that of a daughter whose father had left neither male issue nor widow.

The plaintiff in the case of *Karuna Mai v. Jai Chunder Ghose** was the daughter of the survivor of three brothers. Her own brother succeeded to her father's share, and died unmarried. After she had become the mother of a son she sued her uncles' sons to recover her father's share; she died, and the suit was proceeded with on behalf of her minor son. A decree was passed in his favor, notwithstanding that the pundit pointed out that although the sister's son was an heir, he was not living at the death of the deceased, and that the estate could not remain in abeyance.

It must, however, be admitted that although the author of the *Dayabhaga* does not enumerate the sister in the order of succession, the principle upon which the daughter's heritable right is founded—*viz.*, her offering of funeral oblations by means of her son—applies to the sister. But,

* 5 S. D. B., p. 42.

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in truth, females, though related as *sapiudās*, are generally excluded from the inheritance. "A woman," says Bau-dhayana, "is not entitled to the heritage, for females and persons deficient in an organ of sense or member are deemed incompetent to inherit."* The succession of the widow, the daughter, the mother, and the paternal grandmother takes effect under express texts without any contradiction to this maxim. Although the daughter is admitted, the sister and the son's daughter are both excluded. The special texts are defended upon the doctrine of a spiritual benefit to the deceased conferred by the persons to whom they apply; but nevertheless it must be recollected that females are as a class disqualified by their sex to perform the religious ceremonies prescribed by the Hindu shasters, in order to secure the spiritual welfare of the deceased. The general character of Hindu succession, according to the latest development of its doctrines, is adverse to the heritable rights of women; the four exceptions being the result of express authority in their favor.

Brothers'
grand-
sons.

Next to brothers' sons (*i. e.*, fathers' grandsons), brothers' grandsons (*i. e.*, fathers' great-grandsons) succeed. Brothers' great-grandsons are excluded so long as any *sapinda* exists, for they are fifth in descent from the father.

There was some doubt at one time whether, under Mitakshara law, brothers' grandsons could succeed to the estate of a deceased person. In a reported case it appears that a very few years ago the Judge of the Zillah Court of Patna held that they were not included among the heirs, inasmuch as they are not mentioned by the author of the Mitakshara, who specifies brothers' sons. The case† came in appeal

* Dayabhaga, Chap. XI, Sec. VI, verse 11.

† Kureem Chand Gurain v. Oodung Gurain, 6 S. W. R., p. 158.

before the High Court of Bengal, which had previously held in Gridharee Lall's case (subsequently, however, overruled by the Privy Council) that the enumeration of heirs laid down in that book was an exhaustive one. But without expressing any opinion whether the enumeration was exhaustive or not, the Court held that the word "sons" in the Mitakshara, does as a general rule include all descendants in the male line who can offer funeral oblations.

LECTURE
VII.

On failure of the father's descendants in the male line down to the brother's grandson, the property devolves on the father's daughter's son, in like manner as it descends to the owner's daughter's son. He terminates the list of those who offer oblations to the father, or at least of those who are enumerated in the order of succession. But the father's son's daughter's son, and the father's grandson's daughter's son, are also sapindas; and although they are not enumerated in the list of heirs given by Jimutavahana, yet according to the principle upon which recent decisions have been based, they would probably be held entitled to succeed, in the absence of all nearer heirs.

Father's
daughter's
sons.

Having thus exhausted the list of heirs who derive their right of succession by virtue of the oblations which they offer to the father of the deceased proprietor; the grandfather becomes the person principally considered as the object of funeral oblations.* Jimutavahana says that the succession of his lineal descendants, including his daughter's son, must be understood in a similar manner to that observed in calculating the order of succession amongst the father's descendants. According to this principle the grandfather would be the first in the list, and then the grandmother, next his sons,—i. e., the paternal uncles of the deceased

The
descendants
of
the grand-
father.

* Dayabhaga, Chap. XI, Sec. VI, verse 9.

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proprietor; and so on, till we come to the grandfather's great-grandsons. But Srikrishna Tarkalankara places the grandfather and grandmother last in this branch of the tree of inheritance.

Of the
great-
grand-
father.

The succession amongst sapindas would finally be traceable from the great-grandfather of the deceased proprietor in a similar manner to that which is observed in tracing succession through the grandfather.

Bandhus.

When the list of sapindas calculated on the father's side is exhausted, a new class of heirs has to be sought for. According to the Mitakshara,* those of the same family (gentiles) take precedence of cognates,—in other words, the sapindas who are sprung from the deceased's family take precedence of sapindas who are sprung from a different family. These latter are indicated by the term "bandhu."

Principle
upon which
priority of
succession
is regulated
in the
Dayabhaga.

According to the Dayabhaga,† on failure of kindred who might present oblations in which deceased would participate,—that is, on failure of the father's sapindas, the succession should devolve on the maternal uncle, and the rest who present oblations, which the deceased was bound to offer.

Sapindas.

Those who offer the funeral cakes to the maternal ancestors of the deceased are the sapindas of the deceased, and as such are entitled to rank as his heirs. But those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only.‡ The reason assigned for the distinction is that the cakes offered to the paternal ancestors are of superior religious

* Chap. II, Sec. I, verse 2.

† Chap. XI, Sec. VI, verse 13.

‡ *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar*, 5 Beng. Law Rep., p. 39.

efficacy in comparison to the others. Another principle upon which a preference is assigned, in arranging the order of succession amongst sapindas, is this: that those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones.

After the sapindas are exhausted, including those sprung *Saculyas* from a different family, the next in order are the *Saculyas*, or relatives connected through the medium of divided oblations. Jimutavahana mentions as belonging to this class* "the grandson's grandson or other descendant within three degrees reckoned from him; or as the offspring of the grandfather's grandfather or other remote ancestor." Those who are connected by participating in divided oblations appear to be those who are connected by either giving or receiving undivided oblations from the same person instead of, like sapindas, mutually giving or receiving from one another. The deceased owner gives divided oblations to his three ancestors, they in their life-time gave to ancestors who included the fifth, sixth, and seventh in ascent. These last three, therefore, are *saculyas* of the deceased; so also are the three next in descent from his great-grandson.†

The next class of heirs are the *Samanodakas*, or those connected by libations of water. They are considered to be included in the term *saculyas*.‡ Such relationship extends to the fourteenth person, conformably with a text of Vrihat Menu. But the relation of *Samandoakas*, or those

* Dayabhaga, Chap. XI, Sec. VI, verse 21.

† See Dayabhaga, Chap. XI, Sec. I, verse 37.

‡ Dayabhaga, Chap. XI, Sec. VI, verse 23.

LECTURE VII. connected by an equal libation of water, cease with the fourteenth person.* They succeed in the like order of proximity.

Remote succession.

The Mitakshara,† after treating of the heritable rights of sons, declares “the wife and the daughters also, both parents, brothers likewise”—brothers being understood by Balambhatta to signify both brothers and sisters—“and their sons, gentiles, cognates, a pupil, and a fellow-student; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all persons and classes.”

Cases of remote succession are not very frequent in the Courts. There are two reported cases in the second volume of the Select Reports, in which the subject was considered. Both were decided in the year 1812. In the first‡ the plaintiff claimed as heir to the estate of a deceased Rajah to whom he was maternal first cousin,—that is, son of the sister of the Rajah’s mother. The case was governed by the Mithila law. The defendants were lineally descended from the paternal great-grandfather of the great-grandfather of the Rajah. It was declared by the pundits that, according to the Mithila authorities, the estate of a person, on failure of heirs within the relation of brother’s son, devolves upon the paternal kindred who are sapindas, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person : in default of sapindas, upon the samanodakas, or those

* See Colebrooke’s Digest, Book V, Chap. VIII, verse 436.

† Chap. II, Sec. I, verse 2.

‡ Gunga Dutt Jha v. Sreenarain Rai, Select Reports (new edition), Vol. II, p. 13.

connected by a common libation of water,—*viz.*, the more distant paternal kindred extending to the fourteenth degree: and on failure of samanodakas, upon those termed bandhus or cognates. The suit was therefore dismissed.

LECTURE
VII.

In another case* the plaintiff was the lineal descendant in the sixth degree from the ancestor whose property he claimed. The defendant claimed under a deed of gift from the widow of that ancestor, the widow being his co-defendant. The Zillah Judge dismissed the suit on the ground that the plaintiff had no right of inheritance while the widow lived. On appeal to the Sudder Dewanny, the Hindu law officers declared that, according to the authorities current in Orissa, where the case arose, "if there be no sapindas of the ancestor within three degrees, the saculyas, or remoter relations from three to ten degrees, may succeed to the property on the death of the widow." In a former case, the opinion had been given that according to Bengal law which governed this case, the sons of the maternal uncles would succeed on the death of the widow, provided her gift was void. The Court acted upon the doctrine that the sons of the mother's brothers are heirs in default of nearer kinsmen, and they decreed accordingly.

In later times the subject of remote succession has engaged the attention of the Privy Council in the case of *Bhya Ram Sing v. Ayar Sing*,† which was heard in appeal from the Sudder Court of the North-West Provinces.

Doctrine of
the Privy
Council.

The question was as to the right of succession to the estate of a Hindu who died childless, and who had no blood

* *Roopchurn Mohapatter v. Anund Loll Khan*, Select Reports (new edition), Vol II, p. 45.

† 5 Bengal Law Reports, p. 293.

LECTURE
VII.

relations save those who were descended from an ancestor five degrees removed,—that is, the deceased's great-great-great-grandfather. His widow survived him, and at her death his property was claimed by about sixteen descendants of the ancestor referred to, nine of whom were in the fourth degree of descent from him, and seven were in the fifth. The defendants were in possession, and claimed under a conveyance from the widow. It was contended before the Sudder Court of the North-Western Provinces, that inasmuch as all the claimants were below the third degree of descent from the common ancestor, they were not sapindas, and therefore could not inherit. The Court, however, referred to the Mitakshara* and to the Dattaka Mimansa,† which they considered to furnish the rules for computing the order of succession not only in regard to sapindas, but also to samanodakas. In reference to the first,—that is, the sapindas, or kindred connected by the funeral oblation,—the enumeration should be made until the seventh degree; and in reference to the samanodakas, or those connected by a common libation of water, the relationship extends to the fourteenth degree. The Sudder Court therefore determined that the claimants had a right to inherit according to the Hindu law current in those provinces.

The Privy Council in appeal affirmed this decision; “family union,” they said, “or connection derived from a common head the founder of the family, may reasonably be regarded amongst a patriarchal people as the source of the entire class from which a succession of heirs may be derived.” In the 5th and 6th Sections of the second Chapter of the

* Mitakshara, Chap. II, Sec. V.

† Dattaka Mimansa, Sec. VI, verse 27.

Mitakshara "the gentiles, or gotraja, from the gotra, are described as descending from one common stock, a male, and derived generally through males as forming a family, though embracing possibly many families, and such original bond of union is regarded as necessary as forming the gotra. These conditions are all that are stated as necessary to the constitution of the class of gentiles." No question as to preference of succession was raised, but the judgment in this case proceeded upon the broad principle that as the plaintiffs showed a common ancestor, a gotra, a community of family, a descent which extended to the deceased and themselves, they ranked as heirs under Mitakshara law. Preference amongst them must be founded on the superior efficacy of the oblations which they would be competent to offer, but no ground of entire exclusion from inheritance exists on account of the inferiority of the benefit to be conferred.

Again, the order of succession amongst remote kindred has been recently fully discussed by the Full Bench of the High Court of Bengal; and it is important to attend to the principles there laid down, as it is seldom that, as between the claims of very remote kindred, either text or decision can be cited exactly in point. The case in which the discussion took place and the whole subject received authoritative elucidation was that of *Guru Gobind Shaha Mandul v. Anand Lal Ghose Mazumdar*.*

Of the
High
Court of
Bengal.

The plaintiffs therein sued to set aside certain alienations of immoveable property made by the widow of the last owner. They claimed as heirs according to the doctrines of the Bengal school, being great-great-grandsons of the deceased's great-grandfather. There was living, however,

* 5 Bengal Law Reports, p. 15.

LECTURE
VII.

one who stood to the deceased in the relation of father's brother's daughter's son. It was contended that according to the Dayabhaga and other Bengal authorities, so long as a single sapinda existed,—that is, one who, like the father's brother's daughter's son, offered the cake to any one of the three ancestors of the person whose succession was in dispute,—the remoter descendants were not entitled to succeed. It had been previously held* that a brother's daughter's son was excluded from the succession on the ground that the father's brother's daughter's son was not enumerated in the Dayabhaga in the orders of heirs, and that the text in the Dayakrama Sangraha which authorized such succession was interpolated.

But the question ultimately raised was whether the enumeration of heirs in the Dayabhaga was exhaustive; and if not, whether the principle upon which the author of that treatise based the order of succession would support the heritable right of such relation. It was pointed out by Mr. Justice Hobhouse that such relation was nowhere expressly excluded from inheritance, either in the Dayabhaga or the Dayakrama Sangraha, although the expressed purpose of the Chapter of the Dayabhaga which treats of exclusion from inheritance was to specify persons incompetent to inherit in order to make known by the exception the competent heirs. It was referred to the Full Bench to decide whether such relation can succeed to the estate of a deceased Hindu if no nearer heirs are forthcoming. They ruled that he could. Considerations relating to the spiritual welfare of the deceased proprietor, they said, are the chief, if not the exclusive, guide in determining the order of succession to the estate. Although in the Benares

* Gobindo Hurukar v. Womesh Chunder Roy, W. R., 1864, p. 176.

school the word "sapinda," as used by Menu, was sometimes considered to indicate mere consanguinity, and not the power of conferring spiritual benefit, yet* Jimutavahana repudiated that doctrine, and expressly declared that nearness of kin was not according to the order of birth, but depended on the superiority of benefits by presentation of oblations. The primary rule, therefore, in arranging the order of succession is that the nearest heir is he who is competent to confer the greatest amount of spiritual benefit on the soul of the deceased proprietor.

LECTURE
VII.

In the judgment of Mr. Justice Dwarkanath Mitter, <sup>The Daya-
bhaga.</sup> delivered in this case, it is observed that the whole discussion in the Dayabhaga upon the order of succession is nothing but a mere elaboration of the doctrine of spiritual benefit. "Every point," he says—and I again quote his words—"for which a discussion is thought necessary is ultimately determined by that doctrine, and it is by that doctrine that every difficulty is ultimately removed. The texts of Menu and various other Hindu sages are frequently cited as the highest authorities on Hindu law, but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted, and it is by that light that every discrepancy existing between them is reconciled." For instance, female relatives are excluded as a class, on account of their incapacity to perform the necessary religious ceremonies. The authority of special texts enables a few to secure spiritual benefit to the deceased without the performance of ceremonies, and therefore to take their place in the order of succession. Setting aside female heirs, the male heirs, according to the Bengal school, are divided into four distinct classes ;—(1) the

* Dayabhaga, Chap. XI, Sec. VI, verse 18.

LECTURE
VII.

sapindas who offer the undivided oblations which are of the highest spiritual value; (2) the *saculyas* who offer the divided oblations; (3) the *samanodakas* who offer the libations of water; and (4) when all these fail, certain specified strangers, including the spiritual preceptor and the learned Brahmin of the same village; some spiritual benefit being supposed in the last resort to be derived from the circumstance of his wealth devolving on a Brahmin.

Finally, the same principle of spiritual benefit is applied to the internal arrangement of each one of these four classes so far as the details of such arrangement are actually given in the *Dayabhaga*. "Thus, among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy to the second. Similarly, those who offer larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to the *saculyas* and *samanodakas*."

Remote
succession
according
to the
Mitakshara
Ruling of
Madras
High
Court.

The rights of remote kindred were also considered by the Madras High Court.* The claimants to the estate of the deceased were the two great-grandsons of his great-grandfather, who derived their descent through their mother, whilst the deceased was the paternal great-great-grandson

* See in the case of *K. Kissen Lala v. Javallah Prasad Lala*, 3 Madras H. C. Rep., p. 346.

of the common ancestor. Their mother's sister had no sons, although she had a daughter, who was clearly excluded. The two claimants were collateral kindred relation, in the sixth degree, and there were no other living descendants of the paternal ancestors.

The High Court then addressed itself to the question whether they were within the kindred to whom the law limited the right of inheritance. While admitting that the general rule of inheritance was in favor of their right to succeed, they considered "what is the effect of the authorities and texts of law which prevail in Madras."

Passing in review the fifth and sixth and seventh sections of the second chapter of the Mitakshara, and the primary text of Menu,* they said: "if these passages had been the whole of the law on the subject, and it were *res integra*, we might and perhaps would have considered that the general rule was not expressly controlled so far as to exclude the son of a grand-daughter, the sapinda of a common paternal ancestor, from succeeding as a collateral heir. But it has long been considered that the rule of succession excludes a sister's son from the right to inherit, and no distinction in principle can be drawn between the son of the father's daughter of the paternal grandfather or other more remote ancestor."

The High Court consequently came to the conclusion that the law appeared to be that only descendants of ancestors in the male line within a certain limit are collateral heirs, and that on failure of such heirs the inheritance

* 9 Menu, verse 187.—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then on failure of sapindas and their issue, the *samanodaka* or distant kinsman shall be the heir; or the spiritual preceptor, or the pupil, or the fellow-student of the deceased."

LECTURE VII. passes from the first time to collateral kindred through females who are *bandhus*.

Ruling of
Bengal
High
Court.

In the case of *Thakoor Jeebnath Singh v. The Court of Wards*,* the High Court of Bengal observed:—"The 5th section of the second chapter of the *Mitakshara* was not intended to be an exhaustive enumeration of the *gotrajas*, but only a statement of the order in which they would take." All the gentiles must be exhausted before any one of the cognates can take.

* 14 S. W. R., p. 117.

LECTURE VIII.

THE LAW OF SUCCESSION—WOMEN AND BANDHUS.

General observations—Heritable rights of women—Under the Mitakshara—Under the Dayabhaga—Step-mother—Does not succeed according to the Mitakshara—Nor according to the school of Bengal—Full Bench ruling—Females more readily admitted as heirs under the Mitakshara than under the Dayabhaga—According to a decision of the High Court of Bombay, wives of all sapindas, &c., can inherit—Sisters—Bandhus according to the Bengal school—Sister's son—Son of maternal aunt—Father's brother's daughter's son—Grandson of maternal grandfather's brother—Heritable rights of those sprung of a different family, according to the Dayabhaga—Paternal uncle's daughter's son—Enumeration of such heirs in the Dayabhaga not exhaustive—Their heritable right according to the Mitakshara—Bandhus according to the Mitakshara—Their right to inherit established—Enumeration in the Mitakshara not exhaustive.

THE position which Hindu women occupy in the table of succession, whether framed according to the school of Benares or according to that of Bengal, is not very well defined. The spirit and rules of Hindu law are adverse to their possession of proprietary rights, though the degree of that hostility has varied from time to time, and the exceptions which are undoubtedly made in their favor appear to be the result of certain obvious claims to support and maintenance, overriding the harsh provisions of a law which originally strove to decree their exclusion. A sort of compromise appears to have been eventually made, by which, during the life-time of certain female relations, the course of succession is for the time suspended, and the woman is allowed to possess and enjoy the inheritance, but seldom to become proprietress of it, or to be regarded as the starting-point for a fresh calculation of heirs. When her

General
observa-
tions.

LECTURE
VIII.

life-interest terminates, her existence and her possession of the property are at once forgotten, and we go back to the last male owner who preceded her, and from him calculate the succession,—the nearest heir of the last male owner taking immediately upon the woman's decease. He of course may be a very different person from the heir who would have taken immediately upon the death of the last male owner; and in that way, by the course of descent being suspended during a woman's enjoyment of the inheritance, it is indirectly affected by her. But her possession appears to be a sort of prolongation of the possession of the last male owner, and the course of succession proceeds precisely as it would have done if he were supposed to live on in his female survivors, and only at their death to have finally terminated his own existence.

Heritable
rights of
women.

Women, as I have already pointed out, were rigidly excluded from participating in property so long as any males of the same *gotra* are living; and in the same way they were also excluded from inheritance. The law, however, upon the subject, appears to have undergone some changes, and is not at the present day uniform throughout India. The schools differ as to the extent to which they now recognize the heritable rights of women.

It used to be argued in early times*—"Since the wealth of a regenerate man is designed for religious uses, the succession of women to such property is unfit, because they are not competent to the performance of religious rites." And although the authenticity of the following passages is denied, they are at least consistent with the general teaching. "Wealth was produced for the sake of solemn sacrifices; and they who are incompetent to the celebration of those

* Mitakshara, Chap. II, Sec. I, verse 14.

rites, do not participate in the property, but are all entitled to food and raiment." "Riches were ordained for sacrifices. Therefore they should be allotted to persons who are concerned with religious duties; and not be assigned to women, to fools, and to people neglectful of holy obligations." Jimutavahana,* in the latest times, after some variation of teaching, came round again to this doctrine, and cited with approbation the text of Baudhayana: "A woman is not entitled to the heritage, for females and persons deficient in an organ of sense or member are deemed incompetent to inherit." He fully adopts this doctrine, and defends the four exceptions to it, in practice on the authority of special texts.

But in the meanwhile we find that the author of the *Mitakshara*† disputes the correctness of this view. He says, Under the Mitakshara.

"As for the argument that the wealth of a regenerate man is designed for religious uses, and that a woman's succession to such property is unfit, because she is not competent to the performance of religious rites, that is wrong." He denies that wealth is intended solely for religious uses, and quotes texts of Yajñavalkya, Gautama, and Menu. "Neglect not religious duty; wealth or pleasure in their proper season." "To the utmost of his power a man should not let morning, noon, or evening be fruitless, in respect of virtue, wealth, and pleasure." "The organs cannot so effectually be restrained by avoiding their gratification, as by constant knowledge of the ills incident to sensual pleasure." And even if wealth were produced for sacrifice alone, he says that "the succession‡ of women to estates is most proper, since they are competent to the performance of auspicious and conservatory acts (such as the making of a

* Dayabhaga, Chap. XI, Sec. VI, verse 11.

† Mitakshara, Chap. II, Sec. I, verse 22.

‡ Ibid, verse 24.

LECTURE
VIII.

pool or a garden, &c.).” A woman, he argues, has a right to property, though she has no right to independence. The result is that, as we shall see, under Mitakshara law, the heritable rights of women are more liberally recognized than they are according to the Bengal school, and probably than they were previously to the treatise of Vijnyaneswara.

Under the
Daya-
bhaga.

It thus appears that the table of succession became of a more exclusive character as time went on, for in the Dayabhaga we have the most extreme assertion of female incompetence to inherit. That treatise, so far as it deals with the subject of inheritance, is a mere elaboration of the doctrine of spiritual benefit. And as women are disqualified by sex for the performance of the most essential funeral obsequies, it follows that, under a system of law which perpetually refers to the right to inherit as dependent upon, and springing out of, the right to offer the funeral cakes, women must necessarily be excluded. The particular ceremony in respect of which their disqualification exists is the Parbana Shraddha. This ceremony consists* in the presentation of a certain number of oblations,—viz., one to each of the first three ancestors in the paternal and maternal lines respectively; or, in other words, to the father, grandfather, and the great-grandfather in the one line, and the maternal grandfather, the maternal great-grandfather and the maternal great-great-grandfather in the other. The ceremony is frequently referred to in the Dayabhaga under the name of the *Troipurosik Pind*, or Pind relating to three ancestors. And it is through the oblations presented at this ceremony that the relation of *śapinda*, as now understood, admittedly arises.

* See the judgment of Dwarkanath Mitter, J., in *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar*, 5 Bengal Law Reports, p. 35.

I have already referred to the widow, the daughter, the mother, and the paternal grandmother as the only exceptions to the male order of succession according to the law of the Dayabhaga; and have shown their places in the list of heirs to a deceased owner. I will merely add now a short discussion as to the view taken by the Courts in regard to the position and claims of other women of the family of the deceased.

LECTURE
VIII.

In the case of *Bishen Perea Monee v. Ranee Saogundee*,* decided by the late Sudder Court of Bengal in 1801, the title of the step-mother to succeed was held to be preferable to the paternal aunt, and to the step-mother of the father of the deceased and her two daughters, who were all, however, held to be entitled to suitable maintenance. Subsequently to the suit, and therefore to the demise of the last owner, a son had been born to the paternal aunt; but it was held that the title to the estate, having once vested in the step-mother, could not be altered or affected by the subsequent birth of that son.

Step-mother.

In a note to this case it is pointed out that the opinion delivered by the pundits on which the decision proceeded must have been founded on a notion that the authorities of the law prevailing in Orissa, where the suit arose, were those which were received in the Deccan, and not those which were peculiar to Bengal. A distinction had previously been taken by the same pundits to the effect that, according to the books current in Bengal, the step-mother does not inherit, but the natural mother only; while according to the books of the Deccan, as the Mitakshara, &c., the single word "mother" (*mata*) is inter-

Does not
succeed
according
to the
Mitak-
shara.

* Select Reports (new edition), Vol. I, p. 49.

LECTURE
VIII.

puted both "mother" and "step-mother." It is pointed out in the note referred to, that, although the word "*mata*" in some places in the *Mitakshara* admits of the double interpretation, yet in those passages which expressly treat of the succession of parents to their children, both the text and the argument on which the mother is preferred to the father show that the natural mother and not the step-mother is exclusively referred to.* It is also stated in that note that, so far as the writer's research had gone, "there is no passage in books of authority which expressly declares the step-mother's right of succession."

Nor
according
to the
school of
Bengal.

Accordingly, in later years, in a case† reported in the sixth volume of the *Select Reports*, it was held by the same Court that the step-mother did not succeed according to the law of Bengal. The plaintiff in that case claimed one-third share of the estate of his grandfather, who had left behind him two widows and three sons. The question was, whether an only son having inherited the estate of his father, and being in turn succeeded by his mother, such estate on her death should go to his step-mother or to the son of his father's paternal uncle. It was decided, in accordance with the opinion of the pundits, that this latter relation took the property, and that the step-mother was entitled only to maintenance.

Again, in *Lakhi Priya v. Bhyrub Chundra Chowdhry*,‡ where the plaintiff claimed to succeed as step-mother in a case governed by the law of the school of Bengal, the pundit denied her right to succeed.

* *Mitakshara*, Chap. II, Sec. III, verses 3 & 5.

† *Bhyrobee Dossee v. Nobokissen Bose*, 6 S. D. R., p. 53.

‡ 5 S. D. R., p. 315.

And also according to the Mitakshara it has been held by a Full Bench of the High Court of Bengal* that a step-mother has no right to succeed to the estate of her step-son. The question of course arose with respect to a divided family. It was admitted that she could not, according to the Dayabhaga, which expressly excludes her.†

LECTURE
VIII.
Full Bench
ruling.

The Full Bench considered that it would be contrary to the reason for which, according to the Mitakshara, a mother succeeds to her natural son in preference to his father, to hold that the word "mother" includes the step-mother; nor are step-grandmothers entitled to the rights of grandmothers to succeed to the property of grandsons.‡

But although the Mitakshara, equally with the Dayabhaga, excludes the step-mother from the list of heirs, yet it includes a larger number of the female relatives than are recognized by Jimutavahana, apparently upon the principle upon which mothers are preferred by it to fathers in the order of succession,—that is, "since her propinquity is the greatest."§ The paternal great-grandmother is specially mentioned by the author of the Mitakshara as being placed before her husband;|| and then he proceeds: "In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations."

Females
more
readily
admitted
as heirs
under the
Mitakshara
than under
the Dayabhaga.

* Lalla Jotu Lall v. Mussamut Dooranee Koer, Sutherland's F. B. Rulings, p. 173.

† Dayabhaga, Chap. III, Sec. II, verse 30. And see 1 Morley's Digest, p. 323.

‡ See Mitakshara, Chap. II, Sec. IV, verse 2; and Chap. II, Sec. V, verse 2.

§ Mitakshara, Chap. II, Sec. III, verse 3.

|| See *ibid*, Sec. V, verse 5.

LECTURE
VIII.

Accordingly, Messrs. West and Bühler, in their Digest of Hindu Law,* lay down this rule of succession:—

“On failure of the paternal grandmother, the gotraja-sapindas,—i. e., all the males of the deceased’s family (gotra)—related to him within six degrees downwards and upwards, together with their respective wives, are entitled to inherit the estate of a separate householder. It would seem that the gotraja-sapindas inherit according to the nearness of their line to the deceased,—i. e., that the fourth, fifth, and sixth descendants in the deceased’s own line (*sāmtāna*) should be placed first; next the father’s line,—viz., the deceased’s brothers’ second, third, fourth, fifth, and sixth descendants; next the grandfather and his descendants to the sixth degree; and so on. In Guzerat, the sister is placed at the head of the gotraja-sapindas.” And then the further rule:—“On failure of gotraja-sapindas, the gotraja-samanodakas inherit the estate of a separate householder. Gotraja-samanodakas are all the male descendants, ascendants, and collaterals within thirteen degrees, together with their respective wives; or, according to some, all persons descended from a common male ancestor and bearing the same family name. The samanodakas inherit like the sapindas, according to the nearness of their line to the deceased.”

According to a decision of the High Court of Bombay, wives of all sapindas, &c., can inherit.

The correctness of these rules was discussed by the High Court of Bombay in the case of *Laksmibai v. Jayram Hari*,† in which the plaintiff’s husband was the great grandson of the paternal grandfather’s grandfather of the

* See p. lii of Introduction.

† See West and Bühler’s Digest of Hindu Law, Introduction, p. liii.

‡ 6 Bombay Reports, A. C. J., p. 152.

deceased. The defendants were fifth in descent from the father of the same ancestor. It was admitted that the plaintiff's husband was the more nearly related to the deceased, and would have succeeded to his estate if he had lived; and the only question was whether his widow, the plaintiff, was entitled to do so. Her husband and the defendants were gotraja-sapindas, and the plaintiff relied mainly on the passage in West and Bühler's Hindu Law of Inheritance, which I have just quoted. The case was governed by the Mitakshara, and at Chap. II, Sec. V, verse 5, it is said,—“On failure of the paternal grandfather's line, *the paternal great-grandmother*, the great-grandfather, his sons, and their issue, inherit.” The competency of the widow of a remoter sapinda to inherit being thus recognized, the principle was carried out by the author of the Subodhini, who extends the succession to “the paternal great-grandfather's mother, great-grandfather's father, great-grandfather's brothers, and their sons; the paternal great-grandfather's grandmother, great-grandfather's grandfather, and great-grandfather's uncles, and their sons. The same analogy holds in the succession of kindred connected by a common libation of water.” The High Court observed that, from the mention of the great-grandfather's grandmother (that is, the wife or widow of the most remote of the male *sapindas* in direct ascent), and of the kindred connected by a common libation of water (that is, the *samanodakas*, or collaterals within thirteen degrees), it was clear that the commentator meant to convey that, by a logical interpretation of the Mitakshara, the wives of all *sapindas* and *samanodakas* must be held to have rights of inheritance co-extensive with those of their husbands.

LECTURE
VIII.

In this way, a larger number of females are introduced into the order of succession by the Mitakshara school of lawyers than are allowed by the followers of Jimutavahana.

Sisters.

Although a sister* may succeed to sister, it is in the character of a daughter taking her father's estate; the father being the last full owner in whom the estate vested. It has been held upon several occasions that a sister cannot succeed to her brother's property.† In the case,‡ too, of a mother who has inherited from and through her son, and not from her husband, it has been held that the daughter is not heir after her, the sister never being heir of her brother. Again, in another case, it was held that brothers' sons' daughters are not heirs according to Hindu law.§ Neither sisters nor sisters' daughters can inherit the estate of the brother.||

A different rule prevails in Bombay. There the sister has been held entitled to succeed to her brother. And in *Bhaskar Timbak Acharja v. Mahadev Ramji*,¶ the High Court of that Presidency held that, after the death of a widow, her husband's sister succeeded as next reversionary heir in preference to the sister's son; and that on the authority of *Venayak Anandray v. Laksmibai*,** sisters, like daughters, take absolutely.

* *Rai Sham Bullabh v. Frankishen Ghose*, 5 S. D. R., p. 21.

† *Anundchunder Mookerjee v. Teetaram Chatterjee*, 5 S. W. R., p. 215.

‡ *Raj Koonwaree Kirpa Mayee Debeah v. Rajah Damoodhur Chunder Deyb*, 7 S. D. R., p. 192.

§ *Radhi Pearce Dossee v. Doorgamonee Dossee*, 5 S. W. R., p. 131.

|| *Kaleepershad Surmah v. Bhoirabee Dabee*, 2 S. W. R., p. 180.

¶ 6 Bombay Reports, O. C. J., p. 1.

** 9 Moore's I. A., p. 532.

Although in the Mitakshara* it is laid down that, on failure of the father, brethren share the estate,—and some authorities contend that by this expression are meant sisters as well as brothers,—yet it is generally conceded that at least sisters have no right except on failure of brothers; and in that view they would appear to take by reason of their relationship as daughters.

The next branch of the subject relates to another exception, in the Hindu law of inheritance, to the agnatic character of the order of succession,—viz., the rights of those who claim through females,—i.e., who are sapindas, but who are sprung from a different family.

The sister's son, however, has always been held according to Bengal doctrines to inherit as heir to his mother's brother.† The sister is the source of production of daughters' sons to the father, and the medium of their relation; and therefore the Pundit of the Sudder Bengal Court, in a case‡ cited below, said that "if at the death of the brother no son of the sister existed, still (since the right of the father's daughters' sons could not be otherwise established) she was entitled to enter on the succession and hold until production of her male issue. This, it was said, is analogous to the succession of the daughter to the estate of the father, who died leaving no male issue or widow. The sister's son, and not the sister, was entitled to succeed; for he offered oblations incompetent to the sister at periodical obsequies."‡

* Mitakshara, Chap. II, Sec. IV, verse 1, and the notes; and see *Mussamut Runnoo v. Jeo Rancee*, 1 Select Reports (new edition), p. 10.

† See the case of *Kuruna Mai v. Jai Chandra Ghose*, 5 S. D. R., p. 42.

‡ See *Dayabhaga*, Chap. XI, Sec. VI, verse 8, and note.

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VIII.

So long as the enumeration of heirs contained in the Dayabhaga and Mitakshara were regarded by the Courts as exhaustive, those sapindas sprung of a different family, who were not specially mentioned in the particular treatises which governed the case, were excluded from the inheritance. Besides the silence of the founder of the school, there was the natural reluctance to extend the right of inheritance through females, which appeared to be so sparingly recognized, and which involved the transfer of the property of the deceased to a different family from his own.

For instance, in an early case* reported in the third volume of the Select Reports, the Pundits of the Bengal Sudder Court declared that the law nowhere recognized the brother's daughter's son as heir, and that the claimant in that case, as the grandson of a daughter's son, could not succeed even if there were no other heirs. That, doubtless, would be correct law at the present day; not so the reason assigned—"though they are sapindas, they are not sagotras, and consequently cannot inherit."

Son of
maternal
aunt.

In a later volume† of the same Reports, it appears that the same Court, in 1835, held that the son of a maternal aunt succeeded, according to the Bengal school, in preference to lineal descendants from an ancestor of the deceased before the third degree.

The Court referred to the Pundit to state which of the parties had the better claim as heirs-at-law to the deceased, —viz., the plaintiff, who was the son of his maternal aunt, or the defendants, who were the fifth in descent in the male line from a common ancestor with the deceased. The

* *Ilias Koonwar v. Agund Rai*, Select Reports (new edition), Vol. III, p. 50.

† *Dayanath Roy v. Muthoornath Ghose*, 6 S. D. R., p. 27.

reply was that, as the mother of the deceased and the mother of the plaintiff were the daughters of the same father, and as the deceased left no nearer kinsman vested with the right of offering the funeral oblations, he would share in the oblations offered by the plaintiff to his maternal grandfather; that, according to the Dayabhaga, if there were no sapindas within three degrees, the mother's sister's son has the preference over lineal descendants from a common ancestor beyond the third degree; and that therefore the plaintiff must succeed, under the law of inheritance as current in Bengal, to the estate of the deceased. The Sudder Court ruled in accordance with this opinion.

With regard to the heritable rights of sapindas sprung of a different family from the deceased, they have, till within the last few years, been in many cases persistently denied. Several of them are not specifically mentioned in the Dayabhaga, and were therefore excluded from inheriting; until the doctrine was established that the enumeration of heirs, both in the Dayabhaga and the Mitakshara, is not and never was intended to be exhaustive.

Father's
brother's
daughter's
son.

Taking the Dayabhaga first, there is a decision* of a Full Bench of the High Court of Bengal, which ruled, erroneously as it would now appear, that a paternal uncle's daughter's son is not an heir, according to the Bengal school of authorities. According to the text of the Dayabhaga, it was urged that such a relation was not enumerated in the order of a man's heirs. A decision of the High Court passed in 1863, in *Huree Madhub Roy v. Gooroo Gobind Chowdhry*, to the effect that he was not an heir, was produced; and an

* Gobindo Hureehar v. Woomeschunder Roy, Sutherland's F. B. Rulings, p. 176.

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VIII.

opinion of a Pundit to a similar effect was cited from Mr. Macnaghten's work.* There had, however, been two prior Persian decisions of the late Sudder Court which ruled that such a person was an heir.

The Full Bench, including the late Mr. Justice Shumboonauth Pundit, considered that it was proved to demonstration that the passage in the Dayakrama Sangraha which specified such a relation as an heir formed no part of the original text; that the whole current of authority in favour of such a proposition flowed from that interpolated passage; and that there was no authority for it. While regretting that one who was not only a near relation, but who was capable of conferring the benefit which the owner of an estate, according to Hindu ideas, expected from his heirs, should be excluded from the inheritance, they nevertheless held that he could not, under any circumstances, inherit. They reversed the decision of the Court below with costs, and referred the claimant for his remedy to the Legislature instead of to the Courts, who could only expound and administer the law as they found it.

Grandson
of maternal
grand-
father's
brother.

And in another case,† the estate of a deceased was claimed by the grandson of his maternal grandfather's brother. It was held that, as the fourth in descent from the maternal great-grandfather of the deceased, he was, according to the Hindu law prevalent in Bengal, a *sapinda*.‡ The defendants being the father's brothers' daughters' sons to the deceased, were, in accordance with the view then taken of the authorities, declared to be no heirs at all. It was admitted

* Macnaghten's Principles of Hindu Law, Vol. II, p. 77.

† *Brajakishen Mitter Mazumdar v. Radha Gobind Dutt*, 3 B. L. R., A. C., p. 435.

‡ And see Shamachurn's *Vyavastha Darpana*, p. 279. See *Dayakrama Sangraha*, Chap. I, Sec. X, verse 17.

in the case that if the plaintiff were an heir at all, there was no nearer heir existing.

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And with regard to the subject of enumeration, it appears that, according to the table of succession given in the Dayakrama Sangraha, out of the forty-two enumerated kinsmen who are heirs, there are no less than five who, being females, are mentioned as direct heirs; and no less than ten who, being males, are mentioned as taking through females,—i. e., a proportion of fifteen, out of forty-two enumerated heirs, are themselves females, or take directly through females.* Although it is quite true that there is a strong preference for an agnatic order of succession, it is impossible to say that Hindu law carries its reluctance to admit those who are sprung of a different family within the list of heirs, to the extent of excluding them altogether. The principle upon which they are admitted in the Dayabhaga appears to be that they are inserted in the agnatic line occasionally according to the measure of the spiritual benefit which they are able to confer. And in the Mitakshara, in which the principle of spiritual benefit does not completely override the claims derived from belonging to the same *gotra*, or from consanguinity, they appear to be postponed as a body till the list of males sprung of the same family as the deceased has been exhausted.

Bearing in mind that the order in which the male heirs succeed according to the principles of inheritance laid down in the Dayabhaga, is, (1) sapindas, (2) saculyas, (3) samanodakas, it appears that the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, is regulated by

* See judgment of Hobhouse, J., in *Guru Gobind Shaha Mandal v. Anandlal Ghose Mazumdar*, 5 B. L. R., p. 25.

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the degree in which each member of it is capable of contributing to the spiritual welfare of the deceased proprietor.

Heritable rights of those sprung of a different family, according to the Daya-bhaga.

The heritable rights of those sprung of a different family depend upon this;—that the sapindas of a deceased man include not merely males, but the sons of every female who is related to him in the same degree with his male sapindas. These latter are sapindas because in right of their mother they offer the same funeral cakes which their mothers' brothers offer, or would have offered if in existence. No doubt, oblations offered to paternal ancestors are of higher value than those offered to maternal ancestors; but that is a consideration which determines the question of preference among heirs, but does not justify exclusion.

Paternal uncle's daughter's son.

The paternal uncle's daughter's son offers the same funeral cakes in which the deceased is interested as the paternal uncle's son; he is therefore a sapinda. He is, however, nowhere mentioned as an heir in the Daya-bhaga; hence the decisions which deny his right to inherit, and also the right of those similarly related with himself. His right, however, to a place in the order of succession was finally declared as late as 1870 by a Full Bench ruling of the High Court of Bengal. The judgment of the Court was delivered by Mr. Justice Dwarkanath Mitter and contains the following passage* :—"Every one who has gone through the Dayabhaga must have perceived that the specific enumeration of each individual heir was not the object which the author had in view. It is perfectly true that a few of the heirs have been mentioned by name here and there, but the great majority of them have been left to be determined by the application of the principle of

Enumeration of such heirs in the Dayabhaga not exhaustive.

* *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mazumdar*, 5 B. L. R., p. 42.

spiritual benefit. Thus, of the numerous relatives who are entitled to come in as sapindas by virtue of their right to offer oblations to the maternal ancestor of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then, again, among the saculyas, or kinsmen connected by divided oblations, the grandson's grandson is the only person who has been specifically enumerated; and of the samanodakas, or kinsmen connected by libations of water, not one even has been so enumerated.

"In the face of all these facts, it is impossible to contend that the mere absence of specific enumeration is any ground whatever for excluding one single individual who is really competent to fulfil the conditions of heirship laid down in the Dayabhaga itself. It has been further contended that the order of succession specified in the Dayabhaga down to the saculyas is so precise and complete by itself that there is no room left for the introduction of the paternal uncle's daughter's son, who, if he is entitled to come in at all, must come in among the earlier class of heirs,—namely, the sapindas. We are of opinion that this objection too must fail. If the Dayabhaga were a work of the same character as the Dayakrama Sangraha of Srikrishna Tarkalankara, which does not pretend to do anything more than to lay down a mere table of succession, or categorical list of heirs, there might have been some foundation for this argument. But when we consider that the real object which the author of the Dayabhaga had in view was to establish a general principle of his own, and not to go through all the particular applications of that principle, it is impossible to attach any weight whatever to an argument of this sort. If the claimant in this case had been the son of a maternal uncle's daughter, or some

LECTURE
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other relative of the same description who is merely competent to offer oblations to the maternal ancestors of the deceased proprietor, no such objection could have been possibly urged against him according to the strictest interpretation of the *Dayabhaga*. Why, then, are we to suppose that the author of that work intended to exclude the son of the paternal uncle's daughter, when it is beyond all question that he is competent to offer oblations to a much higher class of ancestors,—namely, the paternal? Why, in fact, are we to suppose that the enumeration of the one class of sapindas was intended to be exhaustive, whilst that of the other, and a far inferior class, was intended to be merely illustrative? If doubts are still entertained on this point, we have only to refer to the provisions of verse 19, section 6, Chapter XI of the *Dayabhaga*. The following is a literal translation of that verse from the original:—

“‘ Therefore a kinsman who is allied by a common oblation as presenting funeral oblations called the *Troipurosik Pind* in the family of the father, or in that of the mother, of the deceased owner, such kinsman having sprung from his *kool*, or stock, though of different male descent, as his own daughter's son, or his father's daughter's son, &c., or having sprung from a different stock, as his maternal uncle, &c., is intended to propound the succession of such kinsman ;’ and the subsequent passage (to the nearest sapinda the inheritance belongs) must be explained as meant to discriminate them according to their degree of proximity.

“Now it is beyond all question that the son of a paternal uncle's daughter is a sapinda of the same description as the son of the father's daughter; and if it is once conceded, as it must be, that the word ‘&c.’ used after the words

'maternal uncle' is comprehensive enough to include every relative who is competent, like the maternal uncle, to offer funeral oblations to the maternal ancestors of the deceased proprietor, we do not see any reason whatever why the same word '&c.,' which is also used after the words 'father's daughter's son,' should not be considered as comprehensive enough to include every relative who is competent, like the father's daughter's son, to offer such oblations to his paternal ancestors. It is perfectly clear that both the texts of Menu relied upon in this verse are as general in their character as possible, for the name of a single heir is not mentioned in either of them. Why, then, are we to suppose that the author of the Dayabhaga intended to limit the operation of these texts in the case of those sapindas who are competent to offer funeral oblations to the paternal ancestors of the deceased proprietor, at the very time when he was extending that operation to every sapinda who is competent to offer such oblations to his maternal ancestors only? Surely if this had been the real object of the author of the Dayabhaga, in open defiance of his own construction of Menu, who is universally regarded as the highest authority on all questions of Hindu law, he would have not only expressed it in a language which could not possibly be mistaken, but he would also have assigned some reason, good, bad, or indifferent, to justify such gross departure from the very principle which he has so often declared to be the fundamental basis of all his speculations."

Now with regard to the order of succession as laid down in the Mitakshara, the following passage declares explicitly the manner in which it is arranged on failure of male issue : — "The wife and daughters also, both parents, brothers

Their
heritable
right
according
to the
Mitak-
shara.

LECTURE
VIII.

likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student; *on failure of the first of these, the next in order* is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all classes and persons." * The cognates, therefore, meaning relations sprung of a different family and afterwards termed "bandhus," only succeed on failure of gentiles,—i. e., of those sprung of the same family, including sapindas, saculyas, and samanodakas,—the principle being that sagotras, however distant in degree, take precedence of bandhus, or those claiming collaterally through a female.

Bandhus
according
to the
Mitakshara.

Bandhus are subsequently defined to be of three kinds,† viz.: the owner's first cousins, the relationship being traced through a female; then his father's first cousins; and lastly, his mother's first cousins, the relationship being derived in the same manner. On failure of the first, the next in order succeeds. If this enumeration were exhaustive, the maternal uncle and the sister's son would alike be excluded, the relationship being confined to those who are in the same degree of descent. Many cases have, accordingly, been decided in which they have been excluded both under Mitakshara and under Mithila law.

In a note of Mr. Colebrooke's to a case reported in the first volume of the Select Reports,‡ it is stated that the books of greatest authority in Mithila on the subject of inheritance being silent with regard to the sister's son, the established opinion is that the male descendant of the remoter ancestor shall inherit, and not a descendant through females of a near ancestor. It does not follow from this

* Mitakshara, Chap. II, Sec. I, verse 2.

† *Ib.*, Chap. II, Sec. VI, verse 1.

‡ New edition, p. 58.

that, in the opinion of Mr. Colebrooke, sisters' sons were to be excluded altogether. LECTURE
VIII.

The subject, however, was discussed by a Full Bench of the High Court of Bengal in the case of *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty*,* where the question referred was whether, according to the Hindu law current in the Benares school, a sister's son was entitled to inherit as a bandhu or cognate. The definition of bandhu was mentioned, that he is a kinsman sprung from a different family, but allied by funeral oblations.† That the sister's son is a sapinda to his mother's brother, being in fact his father's daughter's son, it was said admitted of no doubt whatever; and the real point to be decided was whether, being a sapinda, he was therefore according to Mitakshara law entitled to inherit.‡ The general text upon this subject is that of Yajnavalkya as quoted above, and leaves no doubt that bandhus are entitled to succeed next in order to the gotraja. Their right
to inherit
established.

Although there is an enumeration of bandhus given in the Mitakshara,§ which does not include the sister's son, yet that enumeration, the Full Bench ruled, must be taken to be illustrative and not exhaustive, and does not weaken the force and meaning of the general definition. The judgment then proceeded:—"Neither in that verse, nor in any part of the Mitakshara, is the sister's son expressly said to be entitled to inherit, but if he be conceded to be a sapinda, that title follows as a matter of course." And the Privy Council|| pointed out that "the Enumera-
tion in the
Mitakshara
not
exhaustive.

* Bengal Law Reports, Vol. II (F. B.), p. 28.

† Mitakshara, Chap. II, Sec. V, verse 3.

‡ *Ib.*, Chap. II, Sec. I, verse 2.

§ *Ib.*, Chap. II, Sec. VI, verse 1; and see *ante*, Vol. I, Lecture V, p. 128.

|| *Gridari Lall Roy v. Government of Bengal*, 1 B. L. R., P. C., p. 49.

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sub-divisions of bandhus into three classes is possibly a consequence of that part of the definition which treats them as kinsmen connected by funeral oblations. It may be that the bandhus of the parent, though connected with him by funeral relations, would by remoteness of kinsmanship not be so connected with the son." * * *

"The text does not purport to be an exhaustive enumeration of all bandhus who are capable of inheriting, nor is it cited as such, nor for that purpose, by the author of the Mitakshara. It is used simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus, and all that he states further upon it is the order in which the three classes take,—viz., that the bandhus of the deceased himself must be exhausted before any of his father's bandhus can take, and so on."

And with regard to the doctrine of the Mitakshara upon the subject of succession being regulated by the degree in which the heirs are respectively competent to confer spiritual benefit, the judgment proceeded :—

"It has been justly remarked by Sir William Jones that the doctrine of funeral cakes is the key to the whole Hindu law of inheritance. All the schools of Hindu law that are current in the country are agreed in accepting this principle as their guide, however much they may differ from one another with reference to particular points connected with its application. Those commentators who adopt the other doctrine of consanguinity, merely extend the limits of the sapinda relation by including a large number of persons besides those who are connected by funeral oblations. The author of the Mitakshara, at all events, is no exception to the general rule. The text of Menu, which says, 'to the nearest sapinda the inheritance

belongs,' is frequently cited by him as a leading authority on all questions of Hindu law."

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It has also been attempted, on the ground that the enumeration of heirs by the author of the Mitakshara is exhaustive, to limit the right of collateral succession to the grandson of the common ancestor. The rule of Yajnavalkya given in the Mitakshara* was cited for that purpose in the case of *Thakur Jibnath Sing v. The Court of Wards*.† The plaintiff claimed as heir to his father's sister's son. The defendant was the great-grandson of the deceased's great-great-great-grandfather. The question was whether the remote sagotra took precedence of the Bandhu.

The author of the Mitakshara, it was said, in illustrating Yajnavalkya's rule, has been supposed to limit the heritable right of the class called gentiles. In describing the class, he specifically mentions some of its members; and if the enumeration were taken to be exhaustive, and not merely by way of illustration, the effect would be to modify and alter the text of Yajnavalkya by introducing a principle of exclusion amongst the class called gentiles, which there is no reason to suppose was ever contemplated by that sage. The judgment in this case, adopting that view, and following the previous decisions, established that gentiles or gotrajas must be exhausted before the bandhus can succeed.

The same view has been taken by the Courts of the North-Western Provinces‡ and also of the Bombay Presidency.§

* Mitakshara, Chap. II, Sec. I, verse 2.

† 5 Bengal Law Reports, p. 442.

‡ Daroo Sing v. Rai Sing, S. D. A., N. W. P., 1864, p. 521; Agur Sing v. Ram Sing, S. D. A., N. W. P., 1865, p. 4; Shoodhyan v. Mohan Pandey, S. D. A., N. W. P., 1863, p. 134, cited by the High Court of Bengal; see 5 Bengal Law Reports, p. 449.

§ Rany Srimuty Debeah v. Rany Koond Seeta, 4 Moore's I. A., p. 292; and see West and Bühler's Digest of Hindu Law, p. 137.

LECTURE IX.

THE LAW OF SUCCESSION—EXCLUSION FROM INHERITANCE.

Exclusion from inheritance—Two causes of exclusion—Conduct must be such as to involve loss of caste—Act XXI of 1850, and Regulation VII of 1832—Supreme and Sudder Courts upon that legislation—High Court of Madras—State or condition which causes exclusion—Idiocy—Blindness—Dumbness—Leprosy—Deaf and dumb person—Unchastity of widow—According to High Court of Bombay—According to High Court of Bengal—Ground of excluding the unchaste widow—Forfeiture of estate once vested—Re-marriage of widow—Result of legislation—Effect of Regulation VII of 1852, and of Act XXI of 1850—Effect of Act XV of 1866—Extent to which illegitimate sons are excluded—According to Bengal school estate once vested cannot be divested unless forfeited.

Exclusion from inheritance. THE doctrines of the Mitakshara and the Dayabhaga appear to rest upon the same footing with respect to the exclusion of certain persons from all participation in the ancestral estate and from the right of succession by inheritance. The author of the first-mentioned treatise refers to them by way of stating an exception or specified exceptions to the order of succession. He quotes* and explains the text of Yajnavalkya: "An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained; excluding them, however, from participation." They are debarred from their shares, if their disqualifi-

* Mitakshara, Chap. II, Sec. X, verse 1.

cation arose before the division of the property, but one already separated from his co-heirs is not deprived of his allotment. LECTURE
IX.
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And again, in the fifth chapter of the Dayabhaga, those persons who are incompetent to inherit are also specified, the purpose of the author being expressed by him to be to make known the competent heirs by means of the exceptions. A text of Apastamba is cited: "All co-heirs who are endued with virtue are entitled to the property." The explanation is given by the same sage,—*viz.*, "A son who diligently performs the obsequies of his father and other ancestors is of approved excellence even though he be uninitiated; not a son who acts otherwise, be he conversant even with the whole Veda." His connection with the property is declared to be the reward of acts beneficial to his father. The disqualified persons are enumerated by Menu,*—*viz.*, impotent persons, outcasts, persons born blind and deaf, madmen, idiots, dumb, and those who have lost a sense or a limb. Food and raiment should be given to them,† except to the outcast and his son begotten after his degradation; but the sons of disqualified persons being free from similar defects shall obtain their father's share of the inheritance.

Such being the general doctrine upon the subject as it is found in the leading commentaries, it remains to be seen how it has been enforced by the English Courts, and what modifications have been introduced by the English Legislature.

The causes of exclusion are obviously two-fold: first, those which spring from a man's conduct and lead to his expulsion Two causes
of exclu-
sion.

* 9 Menu, p. 201.

† Dayabhaga, Chap. V, verse 11.

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from caste and consequent deprivation of his right of succession; and, secondly, those which are derived from a man's natural state or condition, disqualifying him for the performance of those spiritual acts which are to benefit the soul of the deceased.

Conduct
must be
such as to
involve loss
of caste.

As regards the first class of cases,—viz., where a man's conduct is in question,—a distinction is naturally drawn, and was recognized by the Hindu law officers of the Sudder Court* as early as 1814, that offences considered with reference to their occasioning exclusion from inheritance must be considered in a two-fold point of view: first, those which involve partial and temporary degradation; and, second, those which are followed by loss of caste. In the former state, that of partial degradation, when the offence which occasions it is expiated, the impediment to succession is removed; but in the latter, when the degradation is complete, although the sinfulness of the offence may be removed by expiatory penance, yet the impediment to succession still remains, because a person finally excluded from his tribe must ever continue to be an outcast.

And again, it was held by the Madras High Court, in the case of *Tarachand v. Reeb Ram*,† that the passages in the *Dayabhaga*‡ and the *Mitakshara*§ which treat of the

* Sheonath Rai v. Mussamat Doyamoyee Chowdhraim, 2 Select Reports, new edition, p. 137.

† 3 Madras High Court Rep., p. 50.

‡ *Dayabhaga*, Chap. V, verses 10, 11, 12. *Yajnavalkya* says:—"An outcast and his issue, an impotent person, one lame, a madman, an idiot, a blind man, a person afflicted with an incurable disease (as well as others similarly disqualified), must be maintained, excluding them, however, from participation." One who cannot walk is lame.

Although they may be excluded from participation, they ought to be maintained, excepting, however, the outcast and his son. That is taught by *Devala*:—"When the father is dead (as well as in his life-

§ Chap. II, Section 10.

exclusion from inheritance of the outcast and his sons, relate only to the title which accrues to a man after his degradation to the property of a family still retaining *caste*; they have no bearing whatever upon the case of members of the new family which have sprung from persons so degraded.

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But all cases of exclusion from inheritance by reason of loss of caste must be considered with reference to the provisions of Act XXI of 1850 and Regulation VII of 1832. Section 9, Regulation VII, 1832, of the Bengal Code, enacts that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu, and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled."

Act XXI of
1850, and
Regulation
VII of 1832.

Eighteen years later the Imperial Legislative Council passed an Act entitled XXI of 1850, which, after reciting

time), an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicity), are not competent to share the heritage. Food and raiment should be given to them, excepting the outcast. But the sons of such persons, being free from similar defects, shall obtain their fathers' share of the inheritance." A person wearing the token of mendicity is one who has become a religious wanderer or ascetic.

By the term outcast, his son also is intended; for he is degraded, being procreated by an outcast. That is confirmed by Baudhâya, who says:—"Let the co-heirs support with food and apparel those who are incapable of business, as well as the blind, idiots, impotent persons, those afflicted with disease and calamity; and others who are incompetent to the performance of duties, excepting, however, the outcast and his issue."

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that it would be beneficial to extend the principle of the Regulation just quoted throughout the territories subject to the government of the East India Company, enacted that "so much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charters within the said territories."

Supreme
and Sudder
Courts
upon that
legislation.

With reference to Act XXI of 1850, Sir Lawrence Peel* appeared to think the Hindu law was intended to be abolished by it, so far as it inflicted forfeiture of proprietary or heritable rights in consequence of deprivation of caste. In an action before him, the issue was whether a Hindu widow had forfeited her right in her husband's estate by reason of having, since his death, led an immoral and unchaste life. The Chief Justice in 1851 held that she had not; although before the Act of 1850 it was understood to be the law, that if a Hindu widow in possession of land as heiress of her husband lived incontinently, the Hindu law disinherited her

The late Sudder Court of Bengal† thought that Act XXI of 1850 and Regulation VII of 1832 should be read together, and that therefore the only deprivation of

* *Doe d Sammoney Dossee v. Nemychurn Doss*, 2 Taylor & Ball, p. 300.

† *Rajkoonwaree Dassee v. Golabee Dassee*, 14 S. D. A., 1858, p. 1895.

caste which would be innocuous to affect rights of inheritance or property, would be that loss of caste which ensued by reason of renunciation of, or excommunication from, religion. LECTURE
IX
—

Sir Barnes Peacock* considered that the preamble of Act XXI of 1850 was wholly irrelevant to the enacting part of that Act. He considered that the Regulation restricted the operation of the rule preventing forfeiture to suits between persons of different persuasions; whilst the Act extended its operation to suits between persons of the same persuasion. Sir Barnes Peacock adopted the same view of the Act as Sir Lawrence Peel. All the rules which in all parts of the territories of the East India Company inflicted any forfeiture of rights on any person on account of his renouncing his religion or being deprived of caste, have by virtue of that Act ceased to be enforced as law.

In a suit† brought in the Court of the Principal Sudder Ameen of the Zillah of Calicut to recover land which had been demised by the plaintiff's father, the defendant set up a purchase from plaintiff's elder brother. The right of action was said to have devolved on the plaintiff by reason of his elder brother having lost his caste, having been expelled from the communion of Brahmins. It was held by all the Courts, including the High Court of Madras, that Act XXI of 1850 clearly applied, and that exclusion from caste no longer operated to deprive a Hindu of his rights to hold, deal with, and inherit his property. High Court
of Madras.

As respects the second branch of the subject,—viz., the natural state or condition which will work a deprivation of State or
condition
which
causes
exclusion.

* See *Srimati Matangini Debi v. Srimati Jaykali Debi*, 5 B. L. R., p. 493.

† *Karuthedatta v. Mele Pullakatt Vassa Devan Namboodri*, 1 Indian Jurist, p. 236.

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Idiocy.

a man's rights of inheritance, I will first refer to the question of idiocy, or the degree of mental disorder which is intended by the texts above quoted. That subject has been discussed by the High Court of Madras in a case* where a Hindu widow had sued her deceased husband's brothers for her son's share of the family estate. The defendants rested their case chiefly on the ground that the son was disqualified by idiocy to inherit. There was no question as to his unsoundness of mind, his incapacity for instruction, his inconceivable delusion as to the most common matters, his inability to perform the most common mental operations. There was no doubt that a deed executed by him would be voidable, and that his marriage contract by English law would be invalid.†

The Court held that he was disqualified from inheriting on the ground of idiocy, inasmuch as he was clearly of unsound and imbecile mind, and had been so from his birth. It was not necessary, they considered, in order to disqualify for inheritance, that there should be such utter mental darkness as to exclude the slightest glimmering of reason. The reason of the rule by which idiots are excluded is, no doubt, as Sir Thomas Stranget‡ states it, the unfitness of persons so situated for the ordinary intercourse of life.

Blindness.

Next with regard to blindness, whether it must be congenital in order to work exclusion from the inheritance, or

* *Tirumamayal Ammal v. Ramasvami Ayyangar*, 1 Madras High Court Rep., p. 214.

† By the Hindu law an idiot's marriage would be valid. See *Daby Churn Mitter v. Rada Churn Mitter*, 2 Morley's Digest, p. 99, where it is said that a lunatic's marriage is valid with the consent of his parents, though effected during the lunacy.

‡ 1 Strange, p. 152.

whether if produced by disease or accident it will have a similar effect, the subject was discussed by the High Court of Bombay. The question* was whether a daughter could inherit who had become blind at the age of four years. The lower Court ruled that she could, relying on the *Ratnagiri* Shastri, who stated that blindness after birth did not disqualify for inheritance. The Shastri of the Adawlut stated that incapacity followed whether the blindness was at birth or ensued afterwards. The Shastri at Puna to whom the question was referred, answered that when blindness occurs after birth, the share of inheritance is not to be given till the blindness has been cured, and that the blind person is entitled to maintenance in the meantime.

With regard to dumbness, it has been decided by the High Court of Bombay,† that it is a disqualification for inheritance in females as well as in males when that infirmity has existed from birth. A dumb widow is debarred from inheriting from her husband in the event of dumbness from birth being established, but she is entitled to maintenance, and she is capable of possessing *stridhun*.

And with regard to leprosy, the High Court of Bombay‡ quoted with approbation the following passage§ from a judgment of the late Sudder Court at Madras:—"It is a fact well known in medical science that the disease of leprosy assumes in some cases a mild and curable form,

* See *Bakubai v. Manchabai*, 2 Bombay High Court Rep., p. 5.

† See *Vallabhram Shivnarayan v. Bai Hariganga*, 4 Bombay High Court Rep., A. C. J., p. 135.

‡ *Janardhan Pandurang v. Gopal and Vasudeb Pandurang*, 5 Bombay High Court Rep., A. C. J., p. 145.

§ See *Madras Reports*, 1860, p. 238.

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while in others it appears in a virulent and aggravated type. The Sudder Court find, on consulting the best authorities on the subject, that it is in the latter case only that the disease is regarded in Hindu law as a disqualification entailing forfeiture of inheritance." The High Court of Bombay held that this appeared from the Mitakshara and the Vyavahara Mayukha to be the correct view of the law.

Deaf and
dumb
person.

In the cases of *Pareshmani Dasi v. Dinonath Dass** and of *Kalidas Das v. Krishna Chandra Das*,† the High Court of Bengal held that a father being deaf and dumb could not inherit the grandfather's property, and that the son of such a father, born after the grandfather's death, cannot succeed to the grandfather's estate.

Unchastity
of widow.

It has been held also by the High Court of Bombay‡ that incontinence excludes a widow from succession to her husband's estate. If, however, the inheritance be once vested in the widow, it is not liable to be divested, unless her subsequent incontinence be attended by loss of caste, unexpiated by penance and unredeemed by atonement. Not only incontinence after the husband's death, but in many cases even adultery during his life-time, may be expiated by penance; but as loss of caste according to Act XXI of 1850 no longer works a forfeiture of any right or property already vested in interest, or impairs or affects any right of inheritance, subsequent incontinence does not deprive a widow of the property to which she has succeeded.

According
to High
Court of
Bombay.

According
to High
Court of
Bengal.

But although the High Court of Bombay decided that incontinence excludes a widow from the succession to her

* 1 B. L. R., A. C., p. 117.

† 2 B. L. R., F. B., p. 103.

‡ *Parvati v. Bhika*, 4 Bombay Reports, A. C. J., p. 25.

husband's estate, it was held by Mr. Justice Markby in the Bengal High Court (and his view was affirmed by the same Court in appeal) that unchastity alone was not, according to the earlier authorities, a bar to her inheritance. He observed that it did not* appear that in any of the commentaries which contain passages on exclusion from inheritance, mention was made of unchastity as a ground of exclusion. According to the text of Nareda,† amongst the excluded persons must be ranked "one who is addicted to vice or has been expelled from society;" and according to a text‡ of Devala, "a leper and a person wearing the token of religious mendicity." Persons of neutral sex and the offspring of incestuous intercourse have also been added. Sancha and Lichita also say "of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water, are extinct."§

The formal degradation from caste, rather than the unchastity of the widow, appears to have been the ground of her exclusion from inheritance. According to the opinion of Mr. Colebrooke|| an unchaste woman is excluded from the inheritance of her husband. In that opinion he relies upon the authority of the author of the Mitakshara,¶ who declares that the right interpretation of certain texts which he quotes is this: "When a man who is separated from his co-heirs and not re-united with them dies leaving no male issue, his widow, *if chaste*, takes the estate in the first instance." Mr. Ellis also agrees that "the wife does not

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Ground of
excluding
the un-
chaste
widow.

* Srimati Matangini Debi v. Srimati Jaykali Debi, 5 B. L. R., p. 466.

† Dayabhaga, Chap. V, verse 13.

‡ Ibid, verse 11.

§ Colebrooke's Digest, Book V, Chap. V, verse 318.

|| 2 Strange, p. 272.

¶ Chap. II, Sec. I, verse 30; see verses 37-39.

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succeed unless she be chaste.* This is a necessary condition: but in all cases she is entitled to maintenance."

According to Mr. Colebrooke, no misconduct other than incontinency operates disinherison; nor after the property has vested by inheritance does she forfeit it unless for loss of caste unexpiated by repentance and unredeemed by atonement.

Mr. Justice Markby, in the case of *Srimati Matangini Debi v. Srimati Jaykali Debi*,† after examining the authorities upon the subject, and relying upon the opinion of Mr. Colebrooke and Sir Thomas Strange, came to the conclusion "that neither for unchastity nor any other vicious act is a right forfeited under the Hindu law. There are acts of gross and continued immorality for which a Hindu may be completely and irrevocably cut off from his family; and from that moment he is to all intents and purposes as one dead, so far as the family is concerned, to which he formerly belonged. Ceremonies are performed as if he were actually so,‡ and the fiction of Hindu law is that from that moment he dates a new existence, as will be clearly seen by the rules which regulate the right to property which he afterwards acquires. Of course, therefore, the property held by such a person passes on to the next taker. How far this power of degradation would now be recognized by the law, and whether unchastity in a widow would be a just cause of degradation, are questions which it is in no way necessary for me now to consider; one of them at least is a question of no little difficulty. What I now hold is that it is not the immoral act alone which in any case destroys the right, but the loss

* 2 Strange, p. 273.

† 5 B. L. R., p. 466.

‡ 1 Strange, p. 160.

of caste or degradation which may follow thereupon. This explains the silence of the Hindu law books as to forfeiture for particular acts of immorality, and accords entirely with the doctrine of expiation, which would otherwise appear to be almost unmeaning." LECTURE
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Sir Barnes Peacock, before whom the case came in appeal, denied "that the estate taken by a Hindu widow by inheritance is an estate only so long as she continues chaste, or an estate liable to be forfeited by an act of unchastity. If the estate is to continue only so long as she continues chaste, it would cease immediately upon an act of unchastity; and in that respect a widow would be in a worse position than a wife, inasmuch as a wife may inherit if her offence is expiated before the death of her husband; but if a widow's estate cease, expiation would not restore it." The Chief Justice also, alluding to the opinion expressed in the Court below, to the effect that the disinherison of an unchaste widow could not take place in the absence of degradation or expulsion from caste, wished to avoid being supposed to express any opinion that, if she were degraded, or deprived of her caste, her estate would cease to exist.

Assuming that incontinence* excludes a widow from succession to her husband's estate, the High Court of Bombay held that if the inheritance be once vested in the widow, it is not liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance and unredeemed by atonement." Forfeiture was therefore rested on degradation from caste. With regard to Act XXI of 1850, the High Court held that it was not limited to renunciation of religion only, but after

Forfeiture
of estate
once vested.

* Parvati Kom Dhondiram v. Bhiku Kom Dhondiram, 4 Bombay Reports, A. C. J., p. 28.

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providing for that case, specially includes deprivation of caste, and is not restricted to deprivation of caste on any particular ground. They took the same view of the Act as was taken by Sir Lawrence Peel in 1851 in *Doe d. Sammoney Dossee v. Nemychurn Doss*,* a case which I have referred to before, as decided in the Supreme Court of Calcutta. Deprivation of caste, therefore, whether it be for change of religion or for unexpiated incontinence or any other cause, can no longer be recognized as either working a forfeiture of any right or property already vested in interest, or as impairing or affecting any right of inheritance.

Re-mar-
riage of
widow.

In the case,† in which the High Court of Bombay ruled as above stated, it appeared that a Hindu died leaving two widows. In his life-time, he turned his first wife out of the house, about a year and a half after he married the second one, who was a widow at the time of the marriage. At his death his second wife possessed herself of all his property, moveable and immoveable, and became a prostitute. The first wife, who had neither deserted her husband, nor was unchaste, sued for a moiety of her husband's estate. The lower Court found that the plaintiff had re-married, and, if that were so, she forfeited her right to a share in her husband's property by virtue of Act XV of 1856. Upon the Judge's decree it did not appear whether she had re-married or whether she had cohabited without marriage. In the former cases she would forfeit her inheritance, in the latter case she would not.

Result of
legislation.

The practical result, therefore, of Act XXI of 1850, taken in conjunction with Act XV of 1856, is that if a

* 2 Taylor & Bell's Reports, p. 300.

† Parvati Kom Dhondiram v. Bhiku Kom Dhondiram, 3 Bombay High Court Rep., A. C. J., p. 28.

Hindu widow re-marry she forfeits all title to her husband's estate; but that if she chooses to live a life of such gross immorality as to lead even to her exclusion from caste and from all respectable society, her rights in her husband's estate are totally unaffected thereby.

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Sir Barnes Peacock, in the case* before cited, made these observations upon the effect of the Regulation and the Act,† which explain fully the view taken by the highest Court of Appeal in this country upon those important enactments. “Under the Regulation of 1832, I think it is clear that in any place in which that Regulation had effect, a Mahomedan in a suit by a Hindu could not have availed himself of any part of the Hindu law which deprived a Hindu of a right of property, by reason of deprivation of caste. If so, it appears to me, that by the extension of that law by Act XXI of 1850 to all parts of the territories of the East India Company, it was declared that all the rules which inflicted any forfeiture of right on any person on account of his renouncing his religion, or being deprived of caste, should cease to be enforced as law. It appears to me that the words “being deprived of caste by reason of renouncing religion” were useless. If the renunciation of religion deprived a man of his right, his being deprived of his caste by reason of that renunciation would not carry the case further. If a Hindu lost his right to property by renouncing his religion, Regulation VII of 1832 deprived a Mahomedan of his right of setting up that defence as against a Hindu, and the Act of 1850 prevented a Hindu from setting up against a Hindu that which a Mahomedan could not set up against a Hindu in that respect.”

Effect of
Regulation
VII of 1832
and of Act
XXI of
1850.

* *Srimati Matangini Debi v. Srimati Jaykali Debi*, 5 B. L. R., p. 494.

† For the Regulation and Act, see Appendix.

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“ If a Hindu widow, without reference to loss of caste, held her estate only so long as she remained chaste, Act XXI of 1850 did not affect the case. If her estate was an estate only to continue so long as she remained chaste, Act XXI of 1850 did not affect the case. But if the widow of a Brahmin lost her estate by reason of the loss of caste entailed upon her by having a child by a Sudra, Regulation VII of 1832 prevented that law from taking effect in suits in which both parties were not Hindus ; and Act XXI of 1850 prevented that law from taking effect in suits between Hindus.

“ In Menu,* it is said that ‘ he who associates himself in one year with a fallen sinner, falls like him : that man who holds an intercourse with any one of those degraded offenders must perform, as an atonement for such intercourse, the penance ordained for that sinner himself. They must thenceforth desist from speaking to him, from sitting in his company, from delivering to him any inherited or other property, and from every civil or usual attention, as inviting him on the first day of the year or the like.’

“ Now I apprehend that the result of Act XXI of 1850 would be to get rid of such a defence as that. If a Brahmin should bring a suit against a Mahomedan to recover his property, that Mahomedan, after Regulation VII of 1832, could not have set up as a defence that the plaintiff had associated himself with a fallen sinner, or that he had held intercourse with any of the degraded offenders referred to in that chapter of Menu. Is it more unreasonable to suppose that the Legislature intended to prevent a Brahmin or any Hindu from setting up, as against another Hindu, a defence of that nature, than to prevent

* 11 Menu, verses, 181, 182, & 185.

a Hindu from setting up against another Hindu any defence which he might otherwise have had by reason of the plaintiff having renounced the Hindu religion? It appears to me that it is not so; and that when the Legislature intended to prevent a Hindu from taking advantage, as against another Hindu, of any part of the Hindu law which deprived his opponent of a right of property by reason of his having renounced his religion, or of his having been excommunicated from his religion, it is not unreasonable that they should also go on and deprive a Hindu of his right to take advantage of any rule of the Hindu religion which deprived his opponent of any part of the Hindu religion by reason of his loss of caste. Looking at the case even as between Hindus, it appears to me that the removal of loss of caste cannot be more objectionable than the removal of that part of the religion which deprived a man of his right by reason of his renunciation of his religion, or excommunication therefrom."

Although by the operation of Act XV of 1856 a Hindu widow forfeits on her re-marriage all property which then vested in her by inheritance from her husband, she does not lose any other heritable rights other than those which are specially mentioned in the Act. For example, if her first husband had left a son who took his estate as heir, and died after the re-marriage of his mother, although she forfeited her right of maintenance, yet her interest as heir to her son was not ousted, and at his death it was held that she succeeded to his estate. The case in which this question was raised, came before the High Court of Bengal. A widow sued the step-brother* of her husband who had taken possession of her husband's property. Her title was as heir to

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Effect of
Act XV of
1856.

* Akera Suth v. Bonani, 2 Beng. Law Rep., A. C., p. 199.

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her son, who had succeeded to his father's estate. The defence was that the plaintiff had re-married, and that in consequence of her re-marriage, all her rights and interest in the estate in question ceased and determined as if she had died. The defendant relied upon the provisions of Act XV of 1856. The question eventually came before a Division Bench of the High Court, exercising appellate jurisdiction over one of the Division Benches, under the provisions of section 15 of the Charter of 1865. The Chief Justice referred to the second section of the Act, which is in the following terms :

“ All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.”

And the Court ruled that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. Inasmuch, therefore, as at the time of the re-marriage her son was living and her title as his heir had not then accrued to her, it could not and did not cease and determine by force of the re-marriage. Nor did the right of inheritance from her son after her re-marriage fall within any of the provisions contained in Sections 3 and 4* of the Act. And Section 5 provides that, “ except in the three preceding

* For these sections, see Act in the Appendix.

sections provided, a widow shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.”

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Then with regard to exclusion springing from the *status* of a person, as the result of incestuous intercourse. It appeared in a case which arose between Sudras, that the Principal Sudder Ameen* of Vizagapatam found that one of the plaintiffs was the son of the defendant by his daughter-in-law whom he kept, but was not an illegitimate son in the sense in which the term illegitimate son is understood in Hindu law. He assented to the doctrine that an illegitimate son inherited from his Sudra father; but denied that the term “illegitimate son” so used was intended to include the issue of an incestuous or illegal marriage or intercourse. In English law an illegitimate child has no rights but what he can acquire. In Mahomedan law he inherits from his mother and mother’s kindred; in Hindu law he inherits from a Sudra father, and therefore in that law it is necessary to define strictly what is meant by “illegitimate son.” The Hindu law, it was said, knows no such general term as illegitimate son; several authorities state that a son begotten by a Sudra on a female slave is entitled to inheritance. It was considered that there were two kinds of illegitimate sons entitled to inheritance in a Sudra family,†—viz., (1) the son of any one of the fifteen descriptions of slaves expressly enumerated in the law; and (2) the son of a woman exclusively kept by the putative father.

* Datti Parisi Nayuda v. Datti Bangaru Nayuda, 4 Madras High Court Rep., p. 204.

† For the authorities, see 4 Madras High Court Rep., p. 208.

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Offspring
of incestu-
ous in-
tercourse.

Upon the question whether the offspring of an incestuous intercourse among Sudras is entitled to share in the family property, the High Court of Madras referred to their own decision in the case of *Muttasamy Jagavira Yettapa Naikar v. Venkatasubha Yettia*.^{*} They held that the child in this case sprung from an exclusive and continued concubinage, and would have inherited but for the fact that the intercourse was clearly forbidden and incestuous. It was considered that the illegitimate son of a Sudra by a woman living with him in adultery would be excluded from participating in the family property; so also the son of a Sudra by one of the superior or regenerate castes would similarly be excluded from participating in the inheritance of his natural father.[†] The rule laid down by the High Court, after a consideration of the authorities, was, that "though the law recognizes concubinage among Sudras and admits the illegitimate sons of the concubine to participate in the estate of the father along with the legitimate sons by his wife, yet that the illegitimate sons will be excluded from this privilege where the intercourse between their parents was one in violation of, or forbidden by, the law."

According
to Bengal
school,
estate once
vested
cannot be
divested
unless
forfeited.

According to Hindu law as taught by the Bengal school, it seems to be clear that an estate once vested cannot be subsequently divested by any act or event which is not in law sufficient to effect its forfeiture. The subsequent birth of any person, not conceived at the death of the last owner, who would have succeeded had his birth occurred before the last owner's death, will not affect the title of one who

^{*} Madras High Court Rep., Vol. II, p. 293.

[†] With regard to the rights of illegitimate children, see *ante*, Vol. I, Lecture VII, pp. 170-172; Dayabhaga, Chap. V, verses 14, 15, & 16; Colebrooke's Digest, Book IV, Chap. IV, verse 142.

has already taken the estate. In an early case* the pundit of the Sudder Court in Bengal declared that an infant plaintiff, having been born after the death of the deceased, could not take his estate which had on his death immediately vested in his surviving heir then existing, nearest in the defined order of succession. The ownership in the estate, he said, could not remain in abeyance, and at the end of an indefinite time vest in an after-born child.

The point eventually came before a Full Bench of the High Court of Bengal, on a reference made in the case of *Kalidas Das v. Krishna Chandra Das*.†

The facts were that, on the death of the last widow of a deceased Hindu, he had no lineal descendants except a son who had been blind from his birth and was therefore excluded from inheritance. The nephew, therefore, of the deceased was at the death of the last widow his next heir; nine years after her death a son was born to the blind man. The question was whether he became entitled to the inheritance from which his father had been excluded. The lower Court held that he was so entitled. There is no doubt that the sons of such excluded persons are not themselves disqualified to inherit.‡ The lower Court considered that the texts which entitle an excluded person after the removal of his disqualification to re-open a partition which has taken place and claim his share, show that according to Hindu law that share which the excluded person, but for his disqualification, would have taken is not vested absolutely and finally in the other heirs; that in fact the

* *Karuna Mai v. Jai Chandra Ghose*, 5 S. D. R., p. 42.

† 2 B. L. R., F. B., p. 103.

‡ *Dayabhaga*, Chap. V, verses 11, 17, 19; *Colebrooke's Digest*, Book V, Chap. V, Sec. I, verses 332 & 335; *Dayakrama Sangraha*, Chap. III, verses 10, 13; and *Mitākshara*, Chap. II, Sec. X, verses 9, 10, 11.

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IX. were in abeyance, and does not pass to the other heirs.

Full Bench
Ruling of
the High
Court of
Bengal.

The question came before a Full Bench of the High Court of Bengal, the judgment of which was delivered by Sir Barnes Peacock. It pointed out that there was no case in which, according to the Hindu law as administered in Bengal, a male who takes by descent takes anything less than a full and absolute estate with full power of alienation, subject, however, to charges for maintenance. The case of a widow adopting a son after her husband's death, and thereby divesting herself of her husband's estate, was referred to; but in such case the ownership is not absolute, and she divests herself of it by her own act. There is no case in which an estate, vested in a male heir by inheritance, can be divested by the adoption of a son by a widow after her husband's death.

The Full Bench held it to be at variance with every principle of the Hindu Law of Inheritance that the blind man's son should at his birth inherit the estate of his grandfather, which had, at that grandfather's death, nine years previously, vested in his nephew, as his then nearest heir. The exact terms of the reference to the Full Bench was, whether by Hindu law, an estate *once vested*, can be divested in favor of the son of an excluded person born after the death of the ancestor, his grandfather, thereby assuming that the lower Court was wrong in holding that the estate in question had remained in abeyance. Accordingly, the judgment of the Full Bench was chiefly concerned with the question whether such estate could be divested according to the Hindu law of Bengal. Death is pointed out in the Dayabhaga as that which occasions an extinction of property, the property of one owner, and

constitutes the property of another; and inasmuch as it thus operates as a complete transfer of the estate, there is no theory upon which a subsequent birth could be held to cancel that transfer and effect another change of ownership. And in the Vyavastha Darpana it is stated* "the existence of the son at the time of the father's death alone constitutes the son's title. The meaning is that the existence of the son is the sole cause of heritable right to which the father's death is an aid. The phrase 'the existence of the son at the time of the father's death,' indicates also the foetal existence of an heir in the womb."

* See page 2.

LECTURE X.

THE LAW OF SUCCESSION—EXCEPTIONAL RULES.

Exceptions—Primogeniture—Equality of division is the general rule—Impartible zemindaries—Nomination of the last owner—Effect of custom—As illustrated in the case of the Tipperah zemindaries—Escheat—Doctrine of the Privy Council as to escheat amongst Hindus—Stridhun—Daughters—Grand-daughters—Daughters' sons—Sons—Husband—Step-daughters—Decisions with respect to daughters—Unbetrothed daughters—What constitutes stridhun—High Court of Bengal—High Court of Bombay—Adoptive mother's stridhun—Outcast women.

Excep-
tions.

IN dealing with the exceptions to the ordinary rules of succession as they are presented to us by the authors of the *Mitakshara* and the *Dayabhaga*, I shall include amongst them the law which governs the descent of a woman's stridhun. That law may fairly be regarded as an exception from ordinary rules, for it deals with only a single event in the course of the devolution of property,—*viz.*, the isolated occasion of its passing in its character of a woman's separate estate. If the woman herself obtained it by inheritance it was by the operation of its ordinary rules, and the order of succession to her heir who takes in this exceptional manner will again be regulated by the general law.

Primogeni-
ture.

But the chief exception to the ordinary Hindu law of inheritance is to be found in the mode in which the rule of primogeniture is occasionally observed. There are many indications that originally the eldest son had considerable advantages over the younger ones; his birth,

for instance, confers greater spiritual benefit,* and he has still the preferable title to the management of joint property at the death of the father. There is a text of Nareda which distinctly says, "to the eldest a greater share shall be given"† on partition. And Menu said,—“The eldest brother may take entire possession of the patrimony: and the others may live under him as they lived under their father, unless they choose to be separated;”‡ and again, “as a father shall support his sons, so let the first-born support his younger brothers; and let them behave to the eldest, according to law, as children should behave to their father.”§

According to Vrihaspati “two modes of partition among heirs are expressly mentioned,—one with attention to priority of birth, and the other with equality of allotment.”|| With regard to the former a double portion to the eldest seemed to be the rule most in favor with the sages;¶ but equality of allotment gradually prevailed. “Let equal shares be given to all without distinction,” said Baudhayana, citing the scripture, “or let the eldest deduct the most excellent chattel.”**

It appears that not merely the best chattel was assigned to him, he received the best apartment also of the house, the rest being distributable according to the pretensions of each.††

Equality of
division is
the general
rule.

* It is through him that the father discharges his debt to his ancestors.

† Colebrooke's Digest, Book V, Chap. I, Sec. II, verse 71.

‡ *Ibid*, Chap. I, Sec. I, verse 9.

§ *Ibid*, verse 12.

|| *Ibid*, Sec. II, verse 30.

¶ *Ibid*, verses 39, 45.

** *Ibid*, verse 40.

†† 1 Strange's Hindu Law, p. 193; Colebrooke's Digest, Book V, Chap. I, Sec. II, verse 46.

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The Courts, as soon as they had to consider the subject, at once ruled in favour of equality of division, and against the claims of primogeniture. There is a decision* to that effect in 1799 by the Sudder Court of Bengal. Although the first-born, according to the oldershashers, might have been entitled in consideration of abilities and condition to a double share, or a share which was $\frac{1}{2}$ th above that of the rest; yet in the *Caliyug*, or present age, since elder brothers of the requisite qualifications are not met with, and since elder brothers are not much revered by younger brothers, the operation of that part of the shasters has ceased. And again, in 1824, it was† decided by the same Court that such a division of property left by a Hindu father as should give a larger portion of it to the elder of two brothers, was forbidden by the shasters of this age. In a note to this case it is stated that the right of primogeniture, which was recognized by the ancient Hindu law, is of no force at the present day. There are many laws enacted by Menu‡ which were confined to the three first ages of the world.

The rule now is that all legitimate sons of the same rank are upon an equality, though the offspring of several wives, and although the number by each differs. The sons severally take *per capita*, and their rights at the distribution of the joint or ancestral estate are not affected in any way by

* *Bhyro Chand Rai v. Rusoomonee*, Select Report, new edition, Vol. I, p. 36; & 3 S. D. R., p. 203.

† *Saliwar Singh v. Pahlwan Singh*, Select Reports, new edition, Vol. III, p. 402.

‡ In a note by Sir W. Jones to his Translation of Menu's Institutes, it is stated that the learned Hindus are unanimously of that opinion; and the texts which led them to that conclusion are cited in the note from the work entitled *madana-ratna-pradīpa* in which they are collected.

the order of their mothers' marriages. Seniority too* by birth, independently of the order of marriages, gives a preferable claim to the management of the joint property. In the case of a plurality of wives of an objectionable class, priority of marriage seems to be regarded by the law only for the purpose of regulating the order of precedence amongst the wives themselves, and the right of each to succeed as heir to the husband in default of sons.

Heirship by right of primogeniture is therefore in Hindu law, at all events at the present day, an exception to the general law of inheritance. It is† applicable to the zemindaries and other estates which are considered in the nature of principalities, and impartible. As respects all other property, except under certain strictly limited grants from the Government, and in the case of some offices, the law at the present day does not recognize right by succession in one of several sons or in one of the male members of an undivided family, to the exclusion of the others, beyond the preferential claim of the eldest to manage the inherited estate.

And even with regard to zemindaries, although the general law with respect to inheritance may, in the case of great families, be controlled by long usage, unless there be positive law to the contrary; and although a Raj, or principality, may descend indivisible to the eldest son, yet it does not follow that any petty family is at liberty to make a law for itself, and thus to set aside the general law of the community. And it has been held by the

* See *Sivananaja Perumal Sethurayar v. Muttu Ramalinga Sethurayar*, 3 Madras H. C. Reports, p. 75.

† *Ibid.*

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Bombay Court* that a custom in the case of a petty Hindu family that the family estates should descend to the eldest son, the second and other sons being entitled to maintenance only, cannot be supported. And in a later case, the High Court of Bombay also† observed, "the custom of succession by reason of primogeniture has hitherto, so far as we are aware, been recognized in other parts of India as applicable only to large zemindaries and other estates which are considered to partake of the nature of principalities. Mr. Steele,‡ in his work on the Customs of the Hindus, states that such a custom is to be found among several of the chief Maratha families, and also among Deshmukhs and Deshpandes. With regard to the great Maratha houses which acquired sway over kingdoms and principalities, Mr. Steele's statement is without doubt correct, but amongst the lesser chieftains and district officers no uniform custom of this character has prevailed, and generally when such a custom has been set up in our Courts it has not been established."

Primogeniture, therefore, is only recognized at the present day when a long established custom in the case of impartible zemindaries or principalities is allowed to override the general law.

Nomina-
tion of the
last owner,

Again, succession sometimes is determined by the nomination of the last owner. That is frequently the case in respect to hereditary *muths*.§ In an early case|| it was held

* *Basvantrav Kidingappa v. Mantappa Kidingappa*, 1 Bombay H. C. Rep., App., p. 42 (2nd edition.)

† *Bhujangrav bin Davalatrav Ghorpade v. Malojirav bin Davalatrav Ghorpade*, 5 Bombay H. C. Rep., A. C. J., p. 161.

‡ p. 28.

§ See *ante*, Vol. I. Lecture III, p. 70.

|| *Dhunsing Gir v. Mya Gir*, 1 Select Reports (new edition), Vol. I, p. 202.

that, according to the usage of the religious order of Gosains or Sunyasis, the mohunt, in his capacity of guru, having instructed his chelas, or pupils, in the doctrine of his sect, selects some one to succeed him at his death. Such nomination is confirmed by an assembly of mohunts at his funeral obsequies, and the pupil is duly installed.

LECTURE
X.

Long-established custom, in a particular family or class, will have the effect of law. But the custom must be strictly proved and strictly followed. If by any reason the custom fails of effect in a particular case, and cannot be followed, then the general law must be resorted to. The custom must prevail in its entirety, otherwise it fails altogether, and will be totally disregarded. Where, for instance, custom establishes the right of free choice, such custom will not be controlled by any observance of a particular rule of selection, though uniform and without exception. If the right of free choice has not been exercised, resort must be made to the general law of inheritance in order to ascertain the person legally entitled to succeed. When a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.*

Effect of
custom-

In an important case concerning the succession to the Tipperah zemindaries,* in which it was admitted that the right of succession to both raj and zemindari, the subject of litigation, was governed not by the general law but by *kulachar*, or family custom, it appeared that the custom was that the reigning Rajah should name a Jubraj and a Burra Thakur, of whom the first succeeded to the throne, and the latter to the office of Jubraj. One of the parties

As illus-
trated in
the case of
the
Tipperah
zemindaries.

* Nilkristo Deb Burmono v. Bir Chundra Thakur, 3 B. L. R., P. C., p. 13; S. C., 12 S. W. R., P. C., p. 21.

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contended that he had a right to be appointed Jubraj, partly in fulfilment of a promise made by a former Rajah, and partly because he was the oldest living member of the class out of which, according to the family custom, a Jubraj could alone be selected. The other claimant insisted that the choice of the reigning Rajah was, at least within a certain class, absolutely free. The Privy Council considered that where custom established the right of free choice, the actual observance of seniority, though uniform and without exception, could not defeat the custom.

Assuming, however, that no selection had been made, it was contended in that case that seniority gave a preferential title. It was said that in the case of a raj, or kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were part of an undivided joint ancestral estate, and apply the law applicable to such an estate with a view to the selection of the eldest from those who would be equal in degree as co-parceners. This position was advanced both in the High Court of Bengal and in the Privy Council without success. The Privy Council observed,—“The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a kingdom exists in one member follows this general law; but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing;* the family may have property distinct from that to which a sole heirship belongs and may continue joint. Still when

* See 1 Strange, p. 198.

a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature; and there can be no community of interest, for claims to an estate in lands and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to the property which is solely owned and enjoyed and which passes by inheritance to a sole heir.

"In the case of *Katama Natchin v. The Rajah of Shiva-gunga*," it is stated, in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice, and that of survivorship. When the latter rule cannot apply, the former must be resorted to. Assuming that no appointment of Jubraj or Burra Thakur had been made, the family custom required the union of two things to constitute the legal heir,—viz., seniority in age and nearness of kin (which in truth is in conformity with the general law of royal descent); the claimant therefore who had but one of these qualifications in himself,—viz., seniority,—could not entitle himself by the family custom. Where a custom

* Moore's L. A., p. 539.

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X.

is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. And a claimant who fails to establish a title by family custom must fall back on the general principles of law."

Escheat.

The next subject which I may deal with in this lecture is one of very exceptional occurrence. I mean the title by escheat. The following passage from the judgment of the Privy Council, in the case of *Gridhari Lal Roy v. Government of Bengal*,* explains the law upon the subject:—

"It is impossible to read the second chapter of the *Mitakshara* without remarking the extreme jealousy with which the Hindu law regarded the right of the king to take on failure of heirs. The 7th section refuses altogether to recognize that right where the property was that of a Brahmin. Admitting it as to the property of the other castes or classes, it expressly says, 'if there be no relations of the deceased, the preceptor, or on failure of him the pupil,' and again, 'if there be no pupil, the fellow-student is the successor.' It thus exhausts the relatives, and then interposes between them and the king three classes of heirs not connected with the deceased by blood or participation in funeral oblations. The title of the king is afterwards stated affirmatively thus, 'The king may take the estate of a Kshatriya or other person of an inferior tribe on failure of heirs down to the fellow-student.' So Menu ordains,—'but the wealth of the other classes on failure of all heirs, the king may take.' So far then the law would seem to be clear that the king cannot take the property to the prejudice either of the maternal uncle or the maternal grand-uncle, either of whom is obviously a relative of the deceased."

* 1 B. L. R., P. C., p. 49.

The subject was also discussed by the Privy Council in the case of *the Collector of Masulipatam v. Cavalay Vencata Narainapah*.^{*} That case was heard in appeal from the late Sudder Court at Madras, and one of the questions which arose was, whether on the death of a Brahmin without heirs, the sovereign power in British India is entitled to take his estate by escheat. The case was treated as one to be determined merely by Hindu law.

LECTURE
X.
Doctrines of
Privy
Council as
to escheat
amongst
Hindus.

According to the Mitakshara,[†] if there be no fellow-students, some learned and venerable priest should take the property of a Brahmana; failing him a Brahmana may be the heir; but "never shall a king take the wealth of a priest;" for the text of Menu[‡] forbids it. "The property of a Brahmana shall never be taken by the king; this is a fixed law." Nareda's text is also given:—"If there be no heir of a Brahmana's wealth, on his demise it must be given to a Brahmana, otherwise the king is tainted with sin." In some way or other therefore the property of a Brahmin who dies without heirs must pass to other Brahmins; a certain power of selection being implied from the text of Menu[§] that they must be such "as have read the three Vedas, as are pure in body and mind, as have subdued their passions."

From these texts the Privy Council inferred that the beneficial enjoyment of a Brahmin's property ought not, on his death without heirs, to pass to the king: that it ought, in some way or other, to pass to other Brahmins. "But," they said, "the texts also show that it is not to pass

^{*} 2 S. W. R., P. C., p. 59.

[†] Chap. II, Sec. VII, verses 3, 4, 5.

[‡] 9 Menu, p. 189.

[§] *Ibid*, p. 188.

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to Brahmins generally, or even to any definite or well-ascertained class of men. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin who could lay hands on the property of a member of his caste dying without heirs, was to hold it, subject perhaps to the condition of shewing that he possessed the personal qualifications which the law requires." The Privy Council therefore held that, according to Hindu law, the title of the king by escheat to the property of a Brahmin dying without heirs, ought, as in any other case, to prevail against any claimant who cannot show a better title. They expressed no opinion upon the question whether Brahminical property so taken was in the hands of the king subject to a trust in favor of Brahmins, or whether such trust, if any, was one incapable of enforcement by reason of the uncertainty of its object.

The Privy Council, however, considered that the claim of the king was not wholly and merely determinable by Hindu law, but rested upon grounds of general or universal law. On the death of any absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner; but when by the personal law there is a *total failure of heirs*, the question ceases to be determinable by such personal law. Therefore, inasmuch as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of this country; while, private ownership not existing, the State must be owner as ultimate lord.

With reference to stridhun, or the separate property of a woman, including what was given to her by her father, mother, husband, or brother, and what was received by her at her marriage, or at her husband's marriage to another wife, and any other separate acquisition, the order of succession differs from the order of succession to the separate or undivided property of a man. In all forms of marriage, according to the Mitakshara,* if the woman "leave progeny,"—that is, if she leaves issue,—her property devolves on her daughters. In this place, by the term "daughters," grand-daughters are signified.

LECTURE
X.
Stridhun.

If the mother be dead,† daughters take her property in the first instance. In the case of competition between married and maiden daughters, the unmarried take the succession; on failure of them, the married daughters succeed. And here again in case of competition between such as are provided for and those who are unendowed, the unendowed take the succession first, but on failure of them those who are endowed.

On failure of the daughters, the grand-daughters‡ in the female line take the succession, and they will succeed *per stirpes* and not *per capita*.§ These grand-daughters in the female line, however, do not appear to be recognized as heirs so long as any of the daughters are living.

Grand-
daughters.

Next to the daughters' daughters, the daughters' sons are entitled to the succession;|| according to the text of Nareda, "Let daughters divide their mothers' wealth, or on failure of

Daughters'
sons.

* Chap. II, Sec. XI, verse 12.

† *Ibid*, verse 13.

‡ *Ibid*, verse 15.

§ *Ibid*, verse 16.

|| *Ibid*, verse 18.

LECTURE daughters their male issue," meaning, the commentator says, X. their daughters' male issue.

Sons. Failing daughters and both grand-daughters and grand-sons in the female line, sons have the right of succession; * on failure of sons, grandsons in the male line will take; † and on failure of them the husband will succeed. ‡ The text is one of Yajnyavalkya's: "Her kinsmen take it if she die without issue." § This is explained by the author of the Husband. Mitakshara to mean that the property of a childless woman married according to any of the four unblamed modes of marriage, belongs in the first place to her husband and then to his sapindas; but, in the other forms of marriage, the property of a childless woman goes first to her mother, next to her father; and, on failure of them, their next of kin take the succession. ¶

Step- It appears, however, that step-daughters and their issue daughters. have a place in the order of succession, and that place apparently would be immediately after the woman's own issue. The author of the Mitakshara, however, says, ¶ that the step-daughter in order to succeed must be sprung of a rival wife superior by class to the deceased. In the Daya-bhaga the law is laid down to the following effect:—

A woman's stridhun goes to her daughter, and not to her sons, if there be a daughter: first, to her unaffianced daughter; second, to those who are betrothed; third, to those who are married.** If she be childless and have been married

* Mitakshara, Chap. II, Sec. X, verse 19.

† *Ibid*, verse 24.

‡ *Ibid*, verse 25.

§ *Ibid*, verse 8.

¶ *Ibid*, verses 10 & 11.

¶ *Ibid*, verse 22.

** Dayabhaga, Chap. IV, Sec. II, verse 23.

according to the four admissible forms of marriage, her stridhun goes to her husband, otherwise the mother inherits in preference to the husband, and in default of the mother the father succeeds. A uterine brother is preferred to the mother and father as heir to the maiden sister. On failure of heirs down to the husband, Vrihaspati propounds the rule,* that those who are similar to mothers take,—viz., the mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother. The order of succession is stated to be according to the various degrees of benefit to the owner of the property from the oblation of food at obsequies.

LEOTURN
X.
—

With regard to step-daughters, it has been held by the late Bengal Sudder Court† that the son of a contemporary wife will inherit, in preference to her paternal great-grandfather's daughter's son's son. Such daughter's son's sons will not inherit under any circumstances. It was stated that if any daughter's son had survived, he would have inherited the ancestral property of his deceased maternal grandmother.

As early as 1793, a case‡ is reported upon this subject, in which a Hindu made over to his daughter on her marriage certain immoveable property by deed of gift. It was registered in the name of her husband. She died without issue male, but left a daughter and that daughter's husband. Subsequently the daughter died, leaving a childless widowed daughter. The husband of the donee survived his wife, and held the property till his death. The Court, in

Decisions
with
respect to
daughters.

* Dayabhaga, Chap. IV, Sec. III, verse 31.

† 6 S. D. R., p. 77.

‡ Prankishen Sing v. Mussamut Bhagwattee, Select Reports (new edition), Vol. I, p. 4.

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X.

accordance with the opinion of its pundit, ruled that, upon the death of the donee, the property devolved to her daughter. Though it was the *stridhun* of the mother, it was not the *stridhun* of the daughter, and upon her death it did not go to her daughter,—that is, to the donee's daughter's daughter,—but to the donee's brother, and if he was not living, to his son. It is pointed out in the note to this case that the decision proceeds upon the supposition that the granddaughter was a childless widow at the time of her mother's decease. If she had been then unmarried, or if her husband had been living, she would have succeeded to her mother's property of every description in preference to the mother's brother or his son. *Stridhun*, at a woman's death, devolves on her daughter, whether married, unmarried, or widow.*

It was also pointed out by the High Court of Bengal in a late case, that when *stridhun* has once devolved in that character upon an heir, it does not continue to devolve as *stridhun*, but afterwards devolves according to the ordinary rules of Hindu law.†

Un-
betrothed
daughter.

The suit in that case was to recover certain moveable and immoveable properties which the plaintiff claimed as heiress to her mother, the properties having constituted her mother's *stridhun*. The plaintiff was unmarried, and claimed to be entitled in preference to her brothers, the defendants, with whom she lived in commensality as a joint Hindu family. The defendants denied the plaintiff's title to any portion of the properties. It was found as a fact that, although the plaintiff was unmarried, she was nevertheless betrothed at the mother's death; and that the mother, shortly before

* See Dayabhaga, Chap. IV, Sec. II, verses 9, 12, & 22.

† Srinath Gungopadhya v. Sarbamangala Debi, 2 B. L. R., A. C., p. 144.

her death, gave birth to another girl, who was the sole unaffianced daughter who survived her mother, and whose death took place a very few days after her mother's. The Principal Sudder Ameen of Rungpore decided that the betrothed or unbetrothed daughter inherits her mother's property with the sons. The High Court, on the authority of the Dayabhaga,* held that the betrothed daughter was not entitled to inherit or take any share in her mother's *stridhun*. The passage was as follows :—" A woman's property goes to her children, and her daughter is a sharer with them provided she be unaffianced, but if married she shall not receive the maternal wealth." The word "children" in this passage is explained by the commentator to mean sons, who, it is said, "share their mother's goods with unbetrothed daughters."

Some perplexity has at times been occasioned as to the extent to which property taken by inheritance by a woman will form part of her *stridhun*. It appears from the decisions † that it does not include property which she may have inherited from her husband or son; neither does it include the *stridhun* of another woman which may have devolved upon her. It would appear to include solely the property which she has inherited from her own relations.

In a case ‡ before the High Court of Bengal it was contended that, although landed estate which a mother has inherited from her son descends at her death to the heirs of that son according to the law of Bengal, yet that, according to the Mithila and Mitakshara laws, the estate which a widow inherits from her husband, or a mother from

* Chapter IV, Sec. II.

† See Lecture II, pp. 26-32.

‡ Panchanund Ojha v. Lall Chund Misser, 3 Sutherland's Weekly Reporter, p. 140.

LECTURE
X.

her son, thereby becomes her *stridhun*; and that the heirs of the widow or mother succeed, and not the heirs of the husband or son. The Court, however, considered that if it was the case that on a property devolving on a woman by inheritance, the Mitakshara law at once changed the whole order of succession, it would have been clearly and distinctly so expressed. *Stridhun* is a special sort of property, and it is nowhere laid down either in Mitakshara or Mithila law that all property which a woman inherits thereby becomes *stridhun*.

High
Court of
Bombay.

Again, in a case decided by the High Court at Bombay,* it appeared that a childless widowed daughter sued to recover some portion of the father's self-acquired immovable property from his two grandsons in the female line,—*i. e.*, through a step-sister of the plaintiff. It was held that though property acquired by a woman by inheritance is classed as *stridhun* in the Mitakshara,† yet in order to become *stridhun* it must be so acquired from her own family.‡ The Court held that the two daughters took at their father's death as co-heiresses an estate in remainder subject to the widow's life-estate; and that as one daughter died leaving the widow, her vested right passed on her death by inheritance to her sons, who upon the widow's death became entitled as representing their mother to enter into the enjoyment of one-half of their grandfather's property.

The same question was discussed by the same Court in a very recent case,§ where the question was,—what right has

* *Jamigatram v. Bai Jumna*, 2 Bombay H. C. Reports, p. 10.

† Chapter II, Sec. II, verse 2.

‡ *Ibid*, verse 4.

§ *Narsappa Lingappa v. Sakharam Krishna*, 6 Bombay H. C. Reports, O. C. J., p. 215.

a widow over property which she inherits from her minor son, her husband having died separated from his family,—whether such property becomes part of her *stridhun* or not? It had been held that *stridhun* acquired by a widow by inheritance can only consist of property inherited from members of *her own family*. Although this view had been questioned by Messrs. West and Bühler, the editors of a Digest of Hindu law, the Court nevertheless considered that it was bound by the rule which had been previously followed. They also considered it a correct rule,—viz., that the widow's right of succession to her son's separated property is the same as that under which she succeeds to her husband's separated property. In the same volume of reports* it is held that an estate taken by the husband's sister, at the death of his widow, is ranked as *stridhun*, and does not descend in the male line until the female line is exhausted.

An adopted son† will take his adoptive mother's *stridhun* in the same way as a son born would do, provided there are no daughters living at the death of the adoptive mother.

Adoptive
mother's
stridhun.

Again, if a Hindu woman who is an outcast in consequence of living by prostitution, die, leaving daughters, one a married woman, living respectably, and the others prostitute, in that case it has been held‡ that the prostitute daughters alone inherit whatever the mother may have left, because the relation of the married and respectable daughter to her outcast mother has been severed.

Outcast
women.

* Bhaskai Trimbak Acharja v. Mahadeo Bamji, 6 Bombay H. C. Reports, O. C. J., p. 1.

† Tincowrie Chatterjee v. Dinonath Banerjee, 3 Sutherland's Weekly Reporter, p. 49.

‡ Taramonee Dossee v. Motee Buneanee, 7 S. D. R., p. 273.

LECTURE XI.

THE LAW OF WILLS—THEIR ORIGIN AMONGST HINDUS.

Early history of wills—Early Hindu law on the subject—Extent to which wills have been the subject of litigation—Of indigenous origin—Early subject of English legislation—Testamentary power of Hindus regulated by Hindu law—The subject of testamentary disposition—Ancestral property under Mitakshara—Privy Council upon that subject—High Court of Madras—Mithila school—Impartible property.

Early
history of
wills.

THE author * of Ancient Law has pointed out that the institution by virtue of which a man's written intentions are allowed to control the posthumous devolution of his goods, is the fruit, in European society at least, of many complex historical agencies. It has a long and continuous history, and its growth can be distinctly traced. In the course of time its character was completely changed. Originally testaments took effect immediately on their execution,—they were not secret, they were not revocable. At the present day wills not merely take effect at the moment of death, but they are considered to speak the intention of the testator at that moment, whatever may be the date of their execution. They are secret,—that is to say, the persons affected by them are not necessarily made acquainted with their provisions until after the death of the testator; they are revocable,—that is, they bind no one until the

* Maine's Ancient Law, p. 174.

death of the testator, and they can, up to that time, be cancelled or superseded.

LECTURE
XI.

It is generally agreed that no trace of this institution existed in the early customs of those races which settled on the confines of the Roman empire. Whatever notion they possessed of wills and testamentary dispositions they borrowed from the imperial jurisprudence. General convenience and the growing influence of the ecclesiastical power led to the rapid and general adoption of the system throughout Europe, notwithstanding the fall of the empire in which it was prevalent. It was, however, of extraneous origin, and, according to the authority of Mr. Maine,* "in all indigenous societies a condition of jurisprudence in which testamentary privileges are not allowed, or rather not contemplated, has preceded that later stage of legal development in which the mere will of the proprietor is permitted, under more or less of restriction, to override the claims of his kindred in blood."

I have already described the character and growth of the existing order of succession in Hindu law to the property of a deceased owner. Succession by survivorship was based upon the notion that the family was continued by its surviving members regardless of the death of their relative; succession by inheritance depends upon the principle of a dead man being represented by his successors. But although Hindu law devotes so large a portion of its attention to the rules which regulate these two modes of succession, and although there is no branch of that law which distinctly recognizes the right to alter either mode at the will of the living proprietor, yet it seems unreasonable to suppose that he was never entirely without influence to disturb it.

* Maine's Ancient Law, p. 177.

LECTURE
XI.
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These ideas, with respect to succession, either by recognizing the survivorship of the family, or by recognizing the posthumous existence of a man in the persons of his heirs, and his posthumous right to have the goods which are no longer available for his temporal enjoyment applied to his spiritual benefit, appear to lead directly to the conception and exercise of testamentary power. According to Mr. Maine,* “in the old Roman law of inheritance, the notion of a will or testament is inextricably mixed up or confounded with the theory of a man’s posthumous existence in the person of his heirs.” The original will or testament amongst the Romans was, according to the same authority, “an instrument or (for it was probably not at first in writing) a proceeding by which the devolution of the family was regulated. It was a mode of declaring who was to have the chieftainship in succession to the testator.”

Early
Hindu law
on the
subject.

Such a proceeding, it is reasonable to suppose, was at least as common amongst the Hindus as amongst the Romans. The selection of a successor by a dying *kurta* of a Hindu family contrary to the rule by which the eldest surviving member of the family would become its head, and the exercise of the power or faculty of adoption, were expedients frequently practised, and show that Hindus were familiar in very early times with a distortion of the ordinary family descent. The *onoomutteeputtro*, or writing whereby a husband empowers his widow after his death to adopt for him, is a document of testamentary character and incidents, and is often treated as a will in the reported cases. Mohunts of temples also frequently appointed, and continue to do so, their successors either by word of mouth

* Maine’s Ancient Law, p. 189.

or in writing; the appointments taking effect from the moment of their death.

LECTURE
XI.

A Hindu, therefore, in very early times must have been familiar with the control by a living person of the posthumous disposition of his family and property. Although intestate inheritance is a more ancient institution than testamentary succession; and, although amongst Hindus, intestacy is the rule, and testacy is the exception, yet it seems impossible to believe that Hindus could have been totally unacquainted with any form or mode of altering descent, so as to suit the wishes or views of expediency of the living proprietor. The order of ideas in their community, with respect to the whole subject of succession, appears to be very similar to that which in the Roman empire led to the introduction and maintenance of a system of wills.

In Mr. Montrieu's* Introductory Essay to his Treatise on the Hindu Will of Bengal, he says that the *dharma*, or infallible rules and scheme of conduct of Hinduism, fully, minutely, and circumstantially regulate posthumous devolution and succession, both proprietary and personal. No express or literal prohibitory enactments in regard to posthumous disposition, such as grew up in the civil law, and such as are promulgated in the Koran and other systems, are found in the Hindu code; but nevertheless unrestricted testamentary or posthumous dispositions are not sanctioned by the shasters.

At the same time both Sir William Jones and Mr. Colebrooke,† the two highest European authorities on the

* Montrieu's Hindu Will, Introduction, p. iii.

† Mr. Colebrooke, however, subsequently recanted the opinion formerly expressed by him.

LECTURE
XI.

subject, have said that "the Hindu law knows no such instrument as a will." There is no chapter in Hindu law which deals with the subject of wills. There is no express authority to be quoted in their support, nor is there any express prohibition against them. And it was stated by Mr. Justice Markby in the case of *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*,* that it is extremely rare even at the present day to find wills made at all by Hindus out of Calcutta. He inferred from the dearth of litigation upon the subject that wills of a complicated character, or even wills of any kind at all, could never have been common in Bengal.

Extent to
which wills
have been
the subject
of litigation.

It appears according to that judgment, that, in the first six years after the establishment of the High Court in Calcutta, there were only four cases respecting documents of a testamentary character. Of those four one purported to be an appointment by a mohunt of his successor, another a power of attorney by a Hindu to his mooktear to alter the succession by alienation in his life-time. The third was a simple Calcutta will, and the fourth was an *onoomuttee puttro*. From 1792 to 1855 there appear to have been only eight cases on the subject of Hindu wills out of Calcutta decided by the late Sudder Court of Bengal, and in those it was by no means clear that the so-called testators considered themselves to be making testamentary dispositions. It is also said on the highest authority that genuine wills of Hindus which alter the succession are, out of Calcutta, still rare. But whether they are rare or not scarcely affects the question as to their origin. At any rate from 1820 to 1860, as many as 418 Hindu wills were filed in the ecclesiastical registry of the late Supreme Court of Bombay. Probably

* 2 B. L. R., O. C., p. 45.

there were more than that number in Bengal. To judge from the cases which come before the Court for decision, apart from those reported simply upon the points of the construction or carrying out the trusts of wills,—*viz.*, cases in which wills are incidentally referred to, I think that those who have practised in the Calcutta Courts will agree that they are frequently met with. LECTURE
XI.

The learned Judge, after an examination of the subject, appears to have concluded that wills of ordinary and simple form are of native origin; but he said that in his opinion “the wills of Hindus in Calcutta are, in any but their very simplest form, of undoubtedly English origin.” He added with regard to wills of a complicated nature, such as those which provide for perpetuities and elaborate settlements, “the Hindus have learned from us the habit of making such wills, and the usage in Calcutta is not a Hindu usage but an English usage adopted by Hindus.”

However infrequent litigation may have been concerning Hindu wills, it seems to be firmly established that they are not of foreign importation. They appear to have been in use not merely in Bengal but throughout India before the establishment of English Courts. Mr. Montrion has pointed out in his ‘Essay upon the Hindu Will,’ on the authority of a statement of the Procureur-General, that at Pondicherry wills of Hindus were recognized in the French settlement from the commencement of the French rule. From the time of the establishment of the Mayors’ Courts in Calcutta and Madras, probates of wills were granted by those Courts. The Supreme Court of Calcutta granted probate of a will of a Hindu within a few months after the Court met for the transaction of business, that is, as early as Of indige-
nous
origin.

LECTURE
XI.

January 1776, and continued to do so during the whole course of its existence. Mr. Montriou has reported a case in which Sir William Jones himself upheld a will as valid, apparently with the concurrence of the pundits, and certainly without any opposition from them.* Again, the will of the Nuddea Raja was submitted to the pundits of various localities towards the end of last century,—viz., to those of Nuddea, Benares, Gya, Dinajepore, Moorshedabad, and Dacca. Amongst them was Jagannatha Tarkapanchanana, the author of the Digest. Not one of these pundits denied the right of a Hindu to dispose of his property by will. They differed as to its effect, but they took for granted the existence of a power of testamentary disposition.†

Sir Thomas Strange, in the second volume‡ of his *Hindu Law*, has given opinions of the pundits of Vellary, Madras, Masulipatam, Chittiam, Chingleput, and Vizagapatam, each upon a different case. They all of them assent expressly or impliedly to the doctrine that a Hindu has power to make a will.

Mr. Justice Norman§ has pointed out that wills are also found in the records of the Zillah Courts at Bombay as appears from numerous cases in Boradaile's Reports. "Of the wills litigated in the late Supreme Court at Bombay, the earliest in point of date is that of Amir Chunder Sikh. Then comes that of Ganga Bissen Kettri, apparently a native of a province in which the rule of the Mitakshara prevails.

* *Monee Lall Baboo v. Gopee Dutt*, Montriou's Cases, *Hindu Law*, p. 295.

† Montriou's Cases, *Hindu Law*, Appendix, Note XVI.

‡ Pp. 417—427.

§ 4 B. L. R., O. C., p. 217.

Again, Hindu wills were made the subject of legislation by the English very soon after they established legislatures in the country. "On the 1st May 1793, Regulation XXXVI of that year was passed 'for establishing a registry for wills and deeds, for the transfer or mortgage of real property'—a Regulation enacted not for the Presidency towns, where the influence of English lawyers may then have prevailed to some extent, but for the mofussil, where there were no English lawyers or European practitioners at all, to suggest or promote the making of wills. In the preamble of this Regulation it is recited that it is desirable 'to afford persons the means of obviating, as far as may be practicable, litigation respecting the authenticity of their wills.' In the body of the Regulation the term used is *wasiatnama*, or will; and the use of this term *wasiatnama* goes far to show that it was with reference to the wills of natives rather than those of Europeans that the law was passed. Moreover, in Regulation II of 1793, which was passed at the same time, the power of Hindus and Mahomedans to make wills is recognised." Two of the Judges of the High Court of Bengal have recently, in the discussions which have arisen upon the testamentary capacity of Hindus,* expressed themselves unhesitatingly to the effect, that however modern may be the origin of the Hindu will, the institution prevailed independently of any decision of the Courts or of any intervention of English lawyers.

LECTURE
XI.Early
subject of
English
legislation.

It follows from this view that the law of wills amongst Hindus is a part of the Hindu law of succession, and not a

Testament-
ary power
of Hindus
regulated
by Hindu
law.

* See the judgment of Mr. Justice Macpherson in *S. M. Krishnamani Dasi v. Ananda Krishna Bose*, 4 B. L. R., O. C., p. 289; and that of Mr. Justice Norman in *Tagore v. Tagore*.

LECTURE
XI.

mere usage which has grown up in modern times borrowed from Western civilization. Consequently the nature and extent of a Hindu's testamentary power, and the rules which control and guide its exercise, and the formalities which attend its due execution, are subjects which belong to Hindu law, and depend upon principles contained in or directly deduced from that law.

Such being the general doctrine with respect to the existence of testamentary capacity according to Hindu law, it remains to show to what extent it has been recognised by judicial decisions to be sanctioned by the law of the different schools. The first branch of this question is, to what class of property the power of testamentary disposition applies; and secondly, what is the limit of the disposing power.

The subject
of testa-
mentary
disposition.

With respect to the Bengal school, under which the power of alienation, whether by will or otherwise, is most firmly rooted, it is unnecessary to cite any case beyond what I have already referred to.* A Hindu by that school can dispose of by will all his property absolutely, whether moveable or immoveable, ancestral or self-acquired.

Ancestral
property
under
Mitak-
shara.

With regard to the law of the Mitakshara school, where there is a difference between the power of alienation *inter vivos* over self-acquired property and over a man's interest in ancestral or joint estate, some discussion is necessary. There is a case of *Nagaluchmee Ummal v. Gopoo Nadaraya Chetty*,† decided by the Privy Council in 1856. It related to the will of a Hindu who died within the Presidency of Madras. The will purported to dispose of both his moveable and immoveable property, which were partly

* See *ante*, pp. 4, 5.

† 6 Moore's Indian Appeals, p. 344.

acquired and partly ancestral. With regard to the acquired property the following passage may be cited from the judgment of the Judicial Committee:—

LECTURE
XI.

“ It must be allowed that, in the ancient Hindu law as it was understood through the whole of Hindustan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown; and it is stated by a writer of authority (Sir T. Strange) that the Hindu language has no terms to express what we mean by a will. But it does not necessarily follow, that what in effect, though not in form, are testamentary instruments which are only to come into operation and affect property after the death of the maker of the instrument were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the judicial authorities in Calcutta as well of the Supreme as of the Sudder Court. No doubt the law of Madras differs in some respects, and amongst others with respect to wills, from that of Bengal. But even in Madras it is settled, that a will of property *not ancestral*, may be good; a decision to this effect has been recognized and acted upon by the Judicial Committee, and indeed, the rule of law to that extent is not disputed in this case.”

With regard to ancestral property, the judgment then proceeded to point out that it would be subject to be disposed of by will, unless by reason of some inherent peculiarity it be withdrawn from the testamentary power. They declined to lay down (it being unnecessary to the decision of the case), the broad and general propositions, that in all

Privy
Council
upon that
subject.

LECTURE
XI.

cases when a man is able to dispose of his property by act *inter vivos* he may also dispose of it by will ; that he cannot do so when he has a son, because the son immediately on his birth becomes co-parcener with his father : that the objection to bequeathing ancestral property is founded on the Hindu notion of an undivided family ; and that when there are no males in the family the liberty of bequeathing is unlimited.

But they held that, under the circumstances of the testator's family in that particular case, when he made his will and codicil, he had validly disposed of his ancestral estates. Those circumstances were, that he was without male issue, kinsman, or co-parcener. He had none but female relatives living at the time of his death, whom he supported out of his estate, and for whose maintenance he provided by his will.

High Court
of Madras.

A few years later the subject was considered by the High Court of Madras, and the principle affirmed that a Hindu may dispose of his ancestral estate by will to the same extent as by act *inter vivos*, and no further. In the event, therefore, of a man being the last surviving member of a joint Hindu family he may alienate it absolutely, but probably not without making provision for those females who were entitled to maintenance out of it.

In the case at Madras above referred to, Sir Colley Scotland delivered the judgment of the Court.* It was a special appeal against a decree of the Principal Sudder Ameen of Tinnevely. The plaintiff claimed certain lands as devisee under a will. There was no finding as to whether the lands were ancestral or self-acquired. The District Moonsiff held that a man without issue might under Hindu law alienate his estate, and that a will

* Vallinayagam Pillai v. Pachche, 1 Madras H. C. Rep., p. 334.

might be confirmed so far as it was consistent with Hindu law, and the rest of it set aside. In the judgment of the High Court, it was observed:—"That the text-books, commentaries, and digests of the Hindu law nowhere directly recognise the disposal of property by a will to take effect after death, and that its varied rules as to inheritance and succession to property seem all opposed to the exercise of such right, are now accepted facts supported by the concurrence of numerous authorities. But notwithstanding this, it is also an undoubted fact that for many years wills have been very generally adopted and in use amongst Hindus in this as well as the other Presidencies, and have been given effect to by the courts of justice and by the course of decisions in Bengal to a very wide extent under the school of law prevailing there.

"In the late Supreme Court of Madras, the cases in which testamentary disposition of property have been held valid and given effect to, and the whole course of practice of the Court, have for some time put it beyond question that so far as its local jurisdiction extended a Hindu might make a valid alienation by will. While Sir Thomas Strange was Chief Justice, the question of the validity of a will, so far at least as it disposed of self-acquired property, appears to have been raised though not decided."

In subsequent years, however, the importance of the subject led to its full discussion and to decisions upon it both by the Supreme and Sudder Courts of Madras, and also to the passing of a legislative enactment. In 1832 it was solemnly decided by the Supreme Court, after a review of previous decisions, that a Hindu had a right to make a will disposing of self-acquired property. In upholding the particular bequests contained in the will before them,

LECTURE
XI

the Court appears to have proceeded by analogy to what they considered to be the Hindu law regulating gifts *inter vivos*. Since that time the testamentary power of Hindus was never doubted, but there does not appear to have been any subsequent decision of the Supreme Court as to the extent to which it may be exercised.

The two earliest decisions of the Sudder Court of Madras seem, according to Sir Colley Scotland, to have been made in 1823 and 1824. In one the Court denied the competency of a Hindu to dispose of the whole of his ancestral property by will to the prejudice of his elder brother; in the other the Court upheld the validity of a will on the broad ground that "a man is authorised to dispose of his property by will which under the same law he could have alienated during his survivorship by any other instrument." The Privy Council, in 1838,* confirmed a decision of the Madras Sudder Court, in which, after examining the Hindu law officers, the Court upheld a will of a Hindu, who died without issue. The Madras Regulation V of 1829 recognizes the giving legal force and operation to Hindu wills as such.

In *Nagaluckmes Ummal v. Gopoo Nadaraya Chetty*,† to which I have already referred, the property was both ancestral and self-acquired. All the decisions and authorities were referred to and discussed on both sides, and the Judicial Committee pointed out that the strictness of the ancient Hindu law had long since been relaxed, and upheld the validity of the will, without, however, expressing any opinion as to the right of disposal by will being co-extensive with the right of disposal *inter vivos*. But the

* *Mulraz Lachmia v. C. Venkata Rama Jagganadha Row*, 2 Moore's I. A., p. 54.

† 6 Moore's I. A., p. 309.

High Court of Madras, in 1863, considered that the exercise of the testamentary power should be considered to be co-extensive with the right of gift or other disposal by act *inter vivos*, which by law, or established usage or custom having the force of law, a Hindu now possesses in Madras.

LECTURE
XI.

And with regard to the doctrines of the Mithila school, there is a case,* in the Select Reports, decided in 1812, in which the pundits of the Sudder Court of Bengal said in reference to this exercise of testamentary power under Mithila law, that although there was no text in which the case of a bequest was expressed to be meritorious, yet the same rule applied to bequests as to gifts; every person who has authority while in health to transfer property to another possesses the same authority of bequeathing it.

Mithila
school.

With regard to impartible property descending according to special custom, it is not clear whether the ordinary course of succession can be changed by testamentary disposition. In one case† in which the question arose, the right heir according to the custom of descent had waived his claim. The eldest son of the right heir claimed under a will with his father's consent, and would, on his father's disclaimer, have succeeded as heir. The case was that of the zemindari of Hunsapore in Behar, which had been for a long period an impartible raj, and by family custom descended according to the rule of primogeniture on the death of each successive Raja to his eldest male heir, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance. The plaintiff, respondent, as such

Impartible
property.

* Sreenarain Rai v. Bhyer Jha, 2 Select Reports (new edition), p. 37.

† Baboo Beerpertab Sahee v. Maharaja Rajender Pertab Sahee, 9 S. W. R., P. C., p. 15.

LECTURE
XI.

heir claimed to succeed to the raj to the exclusion of other members of the family. The appellant insisted upon his title as one of the co-heirs of the late Maharaja according to the ordinary Hindu law.

One ground put forward by the plaintiff was that a will had been made in his favor by the last owner. Upon this subject the Privy Council remarked:—"It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases too numerous to be now questioned have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes as to alienation by gift *inter vivos*. Accordingly it has been settled that, even in those parts of India which are governed by the stricter law of the Mitakshara, a Hindu without male descendants may dispose by will of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindu in those provinces who has sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the Mitakshara his sons in both cases take on their birth an interest in the property which their father, without their consent, cannot displace."

The Privy Council, however, considered that the raj being descendible according to custom to the eldest male

heir, the question whether, according to the law of the Benares school, a Hindu can by will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent, did not arise. The junior members of the family had no inchoate rights of inheritance; they did not by birth acquire that community of interest with their grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power.

LECTURE XII.

THE LAW OF WILLS—TESTAMENTARY POWER.

Limit of disposing power—Former doctrines on that subject—Said to be regulated by general policy of law—History of the doctrines upon the subject—Said to be regulated by general policy of the law—Said to be regulated by some foreign law—Sudder Court of Bengal—*Goberdhun Bysack v. Shamdhun Bysack*—Erroneously said to be unlimited, except so far as expressly limited by Hindu law—Declared by the Privy Council to exist only so far as permitted by Hindu law—Recent adjudications upon the subject—Three points discussed—(1) Whether trusts can be created by will—Rajah Radhakant's will—Opinion of the Appeal Bench—Prosonocoomar Tagore's will—Devises upon trust—(2) Whether particular estates can be created—(3) Whether perpetuities can be created.

Limit of
disposing
power.

THE second branch of the question now under discussion,—viz., the extent to which the testamentary power of Hindus has been recognized by judicial decision to be sanctioned by the law of the different schools,—is, what is the limit of that disposing power. The Hindu Wills Act (XXI of 1870, passed by the Governor-General of India in Council) has now placed that power under statutory regulation so far as regards wills which are executed after the 1st September 1870 in the Lower Provinces of Bengal and in the towns of Madras and Bombay. But it will remain a subject of practical importance for a long time to come, what is the testamentary power which the Courts of Justice recognize Hindus as possessing independently of that statute.

This does not necessitate a long discussion. There have not been many complicated will cases amongst Hindus. When they do arise, they generally concern large property, and find their way eventually to the Privy Council. And whatever may have been the tendency or spirit of judicial decision in this country, the Privy Council took an early opportunity of laying down the principle "that the extent of the testamentary power of disposition by Hindus must be regulated by the Hindu law."*

LECTURE
XII.

That observation was made in the case of *Sonatun By-sack v. Sreemuttee Juggutsoondery Dossee*,† apparently in reference to a discussion which had been carried on in that and in other cases in the late Supreme Court of Calcutta, and in which that principle does not appear to have been clearly understood and adopted as the basis upon which judicial recognition of their disposing power and interpretation of their wills should proceed. For instance, in the case then under appeal, they had said "if the question were untouched by authority, we should be of opinion that the testamentary power engrafted upon the general Hindu law by the customs of Bengal, which has been recognized and established by repeated decisions, must be taken to exist, subject to those restraints which *the general policy of the law* imposes on the exercise of testamentary power in general; and in particular that it cannot enable a Hindu testator to alter perpetually the legal course of succession to his property, by making it pass for all time to those who, taking not as legal but as substituted heirs, would, according to our phrase, take not by descent, but by purchase. But, in truth, we are bound to hold this,

Former
doctrines
on that
subject.

Said to be
regulated
by general
policy of
law.

* 8 Moore's Indian Appeals, p. 18.

† *Ibid*, p. 78.

LECTURE
XII.

unless we are prepared to overrule the decision of the Court when presided over by the late Chief Justice in *Luckun Chunder Seal v. Koorramoney Dossee*.”*

Here there is not a word about limiting and defining the testamentary power by reference to the principles of Hindu law; it is treated as an absolute power to be restrained in its exercise solely by considerations of public policy and expediency, and without reference to the principles of English or any other law. The Privy Council considered that the case ultimately resolved itself into a question of the construction to be put upon a Hindu will, but they emphatically remarked, at the commencement of their judgment, “it may not be improper to observe, with reference to the testamentary power of disposition by Hindus, that the extent of this power must be regulated by the Hindu law.”

History
of the
doctrines
upon the
subject.

The history of legal doctrine upon this subject is marked by some uncertainty and vacillation. And it is only in some recent celebrated cases concerning wills, which were distinctly the product of some erroneous decisions of the Courts, that the true principles upon which the Hindu testamentary power rests have been explained and enforced. There is, no doubt, a case cited by Sir Francis Macnaghten in his *Considerations of Hindu Law*†—*Nobkishen Mitter v. Hurishchunder Mitter*—in which it was held, strictly according to Hindu law, without attempting in any way to modify it by the policy of English or any other law, that a testator could not restrain his devisees from a partition of the property devised to them. He says with reference to it:—“No doubt can exist as to the rectitude of this decree, for a power of partitioning is given in the

* 1 Boulnois' Reports, p. 210.

† page 327.

most unqualified manner to the parties interested by the Hindu law; nor is there anything to be found from which it can be inferred that the possessor has any manner of right to interfere with the pleasure of his descendants on the subject of partition.”

LECTURE
XII.

Nevertheless, the doctrine which found most favour with the old Supreme Court of Bengal in later times was that of an indefinite testamentary power of foreign importation, and therefore unrestricted in itself by Hindu law, but restrained in its exercise by considerations of public policy and convenience. That was the idea expressed in the judgment I have before adverted to, delivered in the case of *Sonatun Bysack v. Juggutsoonderee Dossee*.

Said to be
regulated
by general
policy of
the law.

There is a case in Boulnois' Reports, to which the same observation, as I have made above, applies. In the will in that case,* certain shares in his estate were directed by the testator to pass, not in the course of legal succession, but perpetually in the male line, daughters and daughters' sons being excluded and declared entitled to maintenance only; widows therefore were also excluded by implication.

It was contended, however, that the Court should mould the clause, so as to give effect to the testator's intention within the limits in which, without touching on the rule against perpetuities, he might alter the course of succession. But this, the Court said, would be a very arbitrary proceeding, and tantamount to making a new will for the testator.

They said, “we would endeavour to collect the testator's intention from the terms used by him, and then consider whether it is within the testamentary power, *limited as we*

* Sreemutty Juggutsoondery Dossee v. Manikchand Bysack, 1 Boulnois' Reports, p. 271.

LECTURE
XII.

think that must be by the general policy of the law." The object of the testator in this case being to create for his own property as long as he had any descendants in the strict male line, a new course of descent, was held to be beyond the scope of the testamentary power recognized by law.

Said to be
regulated
by some
foreign law.

Thus, in some cases, the general policy of the law was referred to as limiting the exercise of Hindu testamentary power. In others the definite provisions of some foreign law were introduced for that purpose ; either a law which might be considered in some way to govern the property disposed of, or one which affected generally the person whose dispositions were the subject of discussion. This theory was quite as incorrect as the other, and even more mischievous in its practical application. For example, in *Lucknunder Seal v. Horomony Dossee*,* the Court seemed to treat the power of making a will as unknown to the general Hindu law, and to be founded on local custom sanctioned by judicial decisions. It was accordingly not to be taken to be unbounded, but subject to be controlled by the policy of the general law which governed the person exercising it, or the property over which it was exercised. Some foreign law, therefore, it was clear upon that principle must be resorted to. And accordingly as some of the property, the subject of testamentary disposition, was situated in Chinsurah, at which place the testator died domiciled whilst it was a Dutch settlement, and some was situated in the British possessions, they resorted to Roman Dutch law as to all the property, except the immoveable property situate beyond the bounds of the Dutch territories, and as to that property they resorted

* 1 Boulnois' Reports, p. 211.

to the English law. They held, therefore, that the disposition of immoveable property, situated in the British possessions, was bad; because, according to English law, it was incompetent to a testator to alter in perpetuity the rules of succession. But the same disposition, when applied to property in Chinsurah, and to property governed by the law of the domicil, was good; because, according to the Roman Dutch law, a perpetuity could be created. As to the lands situate beyond the limits of the Dutch territories, they said:—"It seems to us, therefore, that the testator's intention was to limit the succession of his property as above described, and that the intention was one which, according to the rules of the English law, must fail; whilst according to the Roman Dutch law, as proved by the Dutch juris-consults, it ought to prevail. We have not been referred to any rule or authority of Hindu law which affects the question, nor have we ourselves been able to find any. We are, therefore, of necessity driven to some foreign law."

The Sudder Court of Bengal, following the example of the Supreme Court, also considered the validity of Hindu devises by reference to the principles of English law. In one well-known case,* the question was as to the construction of an *onoomuttee-puttro*, or deed of permission to adopt, which is a document of testamentary character, and frequently treated as a will.

In their judgment, the Judges of the Sudder Court of Bengal ruled that the document was to be regarded as a will and as containing a limitation, on failure of male issue of the testator in the life-time of his widow, of the estate of the testator to a son to be adopted by the widow as a *persona designata*; which limitation that Court upheld on the ground

* Bhoobunmoye Debia v. Ramkishen Acharjee, see 3 Sutherland's Weekly Reporter, P.C., p. 16.

LECTURE
XII.

that such a devise would be valid by English law. The Privy Council observed:—"There is no doubt that, by the decisions of Courts of Justice, the testamentary power of disposition by Hindus has been established within the Presidency of Bengal, but it would be to apply a very false and mischievous principle, if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society, differing as far as possible from that which prevails among Hindus in India."

Thus it is only within the last few years that the doctrine has been recognized that the testamentary power of Hindus is based upon, and limited by, the principles and provisions of Hindu law. The late Supreme Court (the Sudder Court, as far as I can see from the reports following its example) were disposed to apply to the wills of Hindus, in order to determine their validity, either the principles of a foreign law, or of general policy; and when diverted from that course, to resort to Hindu law to point out the absence of limitation, rather than the presence of a legitimate foundation, of the testamentary power assumed to be exercised in the case before them.

*Goberdhun
Bysack v.
Shamdhun
Bysack.*

Such in fact was the latest development of doctrine before the theory was finally established, that the existence and extent as well as the exercise of testamentary power by Hindus depend upon the principles and provisions of Hindu law. In order to understand fully this new step in the right direction, though it proved for the time a new source of error, the proceedings and judgment of

the Supreme Court in the case of *Goberdhun Bysack v. Shamdhun Bysack** must be consulted. LECTURE
XII.

That case was decided in the late Supreme Court of Bengal, and was a part of the litigation which had arisen out of the will of Ramdass Bysack, a Hindu, who had died, leaving four sons, the two younger of whom survived to the time of the litigation. The eldest had died, leaving three sons; the second had died, leaving two sons.

The Privy Council had declared, in the previous litigation which arose out of this will, that, by the true construction of the will, property granted to an idol was effectually granted for the benefit of the testator's four sons and their offspring in the male line as a joint family, subject to certain charges; and that the surplus income, after meeting those charges was in like manner effectually granted for the benefit of the four sons and their offspring in the male line as a joint family. They held that there was no absolute grant to the idol; but after providing for its expenses, there were two divisions of the will, the testator evidently contemplating two events; one in which the family was to continue undivided, and the other in which the family was to become divided. They construed the will in reference to the first event, no division of the family having at that time taken place.

Afterwards the two survivors, out of the four sons of the testator, had become separate in food from the other members of the family, but the Privy Council held that that did not constitute a division within the meaning of the will. In giving judgment, the Chief Justice, Sir Barnes Peacock, made the following remarks:—"The necessity of keeping the legal estate in a certain person or persons, as remarked

* Bourke's Reports, p. 282.

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by Sir Lawrence Peel, in *Shibchunder Doss v. Shibkissen Banerjee*,* is not much considered in Hindu conveyance. In this case, as in that, the primary object was to endow the idol.

Having discovered the intention of the testator, we are bound to give effect to it; unless, by so doing, the law would be infringed." The same argument, he added, applies to that part of the will which directs that his sons and grandsons shall have the power of enjoying the surplus profits only.

Erroneously said to be unlimited, except so far as expressly limited by Hindu law.

There was, however, a direction in the will which required annual adjustment of the accounts and bequeathed portions of the surplus only, and thus tended to create a perpetuity. It was contended that this was bad.

Sir Barnes Peacock, after referring with disapproval to the case in which Roman Dutch law was applied to part, and English law to the remainder, of a Hindu testamentary disposition, proceeded:—"It appears to us that the validity of the will must be determined according to Hindu law, and according to that law alone. *If that law contains no rule against perpetuities, we must hold that a devise is not by that law invalid upon the ground that it tends to create a perpetuity.* Then why are we to resort to some other foreign law which disallows perpetuities? There is no rule of Hindu law which invalidates a conveyance, or a gift *inter vivos* upon the ground of its creating a perpetuity. Then why are we to seek for some foreign law to render void a bequest contained in a will of a Hindu, and which is valid according to Hindu law? Imagine what a system of law we should have to administer if we were told that it was the Hindu law modified by the policy and principles of the English law. If it is contrary to policy to allow the Hindu

* 1 Boulnois' Reports, p. 71.

law to prevail to its full extent, let that law be modified by the Legislature, but not by the Judges. It is our duty to administer the law as we find it, not to alter the law according to our notions of policy. Even if we could do so, to what a small extent would our power be limited. It could not extend beyond lands situate in Calcutta, and suits instituted in the Supreme Court.

“No rule against perpetuities is known in the mofussil Courts or in the Sudder Court when construing the will of a Hindu, and we should be introducing inextricable confusion if we were to adopt such a rule here. Even in the present case some of the lands are at Dacca, and some in Calcutta. If the suit had been instituted in the mofussil as to the lands at Dacca, the will would be construed according to the Hindu law, without any modification to adapt it to the policy of the English law. Then ought some words in the will of a testator to be held to have one effect as regards the same lands if the suit is commenced in the Supreme Court, and another effect if the suit is commenced in the mofussil? The inconvenience and anomaly would be very great under any circumstances; but the inconsistency, though not so apparent now, will become glaring when the Supreme Court and the Sudder Court are amalgamated.

“It is said that the testamentary power of a Hindu is unknown to the Hindu law, and is founded upon local custom recognized and sanctioned by judicial decisions. But those decisions are based upon the assumption that the power is given by Hindu law; and although the power is limited to those places in which a particular school of Hindu law prevails, and is modified according to its doctrines, it is still the Hindu law which we have to administer, in the

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Declared
by the
Privy
Council to
exist only
so far as
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by Hindu
law

same way as the Courts administer the common law, when they hold that lands in Kent descend according to the custom of gavelkind. If we are to read and give effect to the wills of Hindus according to the light and policy of the English law, the intentions of nearly every testator will be frustrated."

Notwithstanding the different theories which have from time to time prevailed, it has at length been finally established, by a concurrence of the highest authorities, that "the extent of the testamentary power of disposition by Hindus must be regulated by the Hindu law." Those are the words in which the Privy Council laid down the rule; and as Hindu law is silent upon the subject, that power must be regulated by principles to be found in, or directly deduced from, that law. A Hindu can have no greater power of disposition by will, than he has by his own law, *inter vivos*. It is not that the limitations of that power which English law recognizes and creates, have no existence amongst Hindus; nor that the power exists generally subject to such limitations as Hindu law may impose. Hindu law is silent, both as to the right to bequeath by will, and also as to the limitations to that right. That right only exists so far as it is consistent with the principles of Hindu law, and the practice of Hindus with regard to alienation. The question is not what is the extent of the limitation so much as what is the extent of the power.

The application of this principle has given rise to considerable discussion. From the last decision which I have quoted, it seems clear that it at first was understood to mean that only those limitations to that power would be imposed, which were expressly to be found in Hindu law. If, for example, that law does not restrain a man from creating a perpetuity, or contains no provision which pre-

vents it, no other law will be resorted to for the purpose of applying such restraint. The right to create a perpetuity, in the absence of prohibition, seems to have been assumed, without enquiring into the grounds upon which it rested, and whether such a right could be, under any circumstances, sanctioned by Hindu doctrines.

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In the last two or three years, the discussion upon the whole subject of Hindu testamentary power has been renewed. The idea apparently spread in the Hindu community that, as Hindu law contained no express limitations upon the right of disposition by will, and that the limitations imposed by English law did not apply, therefore the testamentary power which they would be recognized to possess was tantamount to a power of legislation for all time over the dealings of their descendants with the property devised, and over the mode in which that property should be enjoyed. In one or two instances it was held that there was no rule against the creation of a perpetuity by Hindus; in other words no rule of Hindu law which prevented a testator from tying up his property in a perpetual settlement. Some curious and complicated settlements were the result; the principal of which were contained in the wills of Rajah Opoorbokrishna Deb Bahadoor, Rajah Radhakant Deb Bahadoor, and Baboo Prosonno Coomar Tagore, the Founder of this Professorship. The discussion on the whole subject was pursued at considerable length by the High Court of Bengal, in the celebrated case of *Tagore v. Tagore*, which arose out of the last of the three wills which I have mentioned.

Recent
adjudica-
tions upon
the subject.

Three important points are there and in the litigation which arose under the other two wills fully discussed: first, whether the system of trusts, so familiar to English lawyers, has been grafted upon Hindu law, so as to enable a Hindu

Three
points
discussed.

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testator to create trusts by his will, and, if so, to what extent; secondly, whether he can devise particular estates, that is, carve out different rights in the same thing, or whether the thing itself must alone be the subject of disposition; and, thirdly, whether he can create a perpetuity.

(1) Whether trusts can be created by will.

With regard to the first point, Sir Barnes Peacock first raised the discussion, in the case of *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*,* which related to Opoorbokrishna's will, in these words:—"I am not aware of any rule of the Hindu law by which grants *inter vivos*, or gifts by will in perpetuity, are expressly prohibited: but it appears to me to be quite contrary to the whole scope and intention of Hindu law, and that there are no means according to the Hindu law by which such gifts or grants can be effected. The Hindu law, so far as I am acquainted with it, makes no provision for trusts." Without the intervention of trusts, there are no means by which a perpetuity can be carried into effect. Sir Barnes Peacock laid it down that, "putting out of the question the case of religious endowments, a devise by a Hindu which would be void as a condition is void in the shape of a trust."

Rajah Radhakant's will.

The discussion so commenced was pursued at greater length, in the case of *S. M. Krishnaramani Dasi v. Ananda Krishna Bose*,† which was brought to establish and construe the will of Rajah Radhakant Deb Bahadoor. Mr. Justice Markby, who heard the case in the Court of first instance, pointed out in his judgment that there was nothing in Roman law analogous to the English system of trusts; the very foundation of it, he said, was wanting. The double aspect under which every species of property subject to a

* 2 Bengal Law Reports, O. C., p. 34.

† 4 Bengal Law Reports, O. C., p. 231.

trust has to be viewed;—the trustee on the one hand who is declared by the law to be the absolute and uncontrolled owner, and the *cestui que trust* as he is called on the other, who has a right in equity to interfere in the ownership, and compel the trustee to abandon all or nearly all his rights in his, the *cestui que trust's*, favor. He added that there was not the least ground for supposing that anything of the kind exists in Hindu law, and that to introduce the English law of trusts between Hindus would violate the intention of the Legislature.

Although trusts had constantly been administered by the late Supreme Court between Hindus, the learned Judge denied that they must in consequence now be taken as a part of the Hindu law; for although the Judges of that Court were bound to administer Hindu law, they nevertheless acted entirely in accordance with English procedure, which procedure had since been varied.

He considered there was no reason why a testator should not create an obligation between his heir or devisee and a legatee. And if the Hindu law has made an idol a juridical person capable of holding property and possessing legal rights, there is no reason why an idol should not be the direct object of testator's bounty, and have the right to claim from the heir or devisee a specified portion of land. Such a claim would be enforced by the managers on behalf of the idol, just as a claim is enforced by the Secretary of State on behalf of the Government, or by the public officer in some cases on behalf of a joint stock company.

Sir Barnes Peacock, whose expressed opinion in the case of *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* had been cited by Mr Justice Markby, remarked in appeal that there were many cases in which trusts

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had been enforced against Hindus, both by the Courts in this country and by Her Majesty in Council upon appeal.* Referring to his former expression:—"The Hindu law, so far as I am acquainted with it, makes no provisions for trusts; and putting out of the question the case of religious endowments, a devise by a Hindu which is void on the ground of a condition is void in the shape of trust," Sir Barnes Peacock remarked:—"I did not say, nor did I intend to say, that a devise upon trust for a purpose which might be legally carried into effect, without the intervention of trustees, would necessarily be void; or that in such a case, according to Hindu law, the devisee in trust would take the estate absolutely for his own use, or that the heir-at-law would take the estate wholly discharged from the trust. I do not think that the devise upon trust is wholly void, or that the heir-at-law will take the estate charged with payments and annuities directed to be made by the trustees; but that the estate is well and sufficiently vested in the trustees for the purpose of carrying into execution such of the trusts as are valid, and that, subject to such trusts, the beneficial interest in the estates is vested in the testator's heirs-at-law."

Mr. Justice Macpherson in the same case considered that the Court was bound to recognize trusts amongst Hindus, and to give effect to them. He pointed out that there was nothing in Hindu law which was repugnant to, or inconsistent with, the idea of a trust; that trusts are not unknown to the Hindu law; and that trusts as among Hindus have been recognized and administered for the last century by the High Court and the late Supreme Court. And he

* See 6 Moore's Indian Appeals, p. 531, and cases cited; 2 Bengal Law Reports, O. C. J., p. 103.

added:—"I think that, both by Hindu law and the practice which has always prevailed in our Courts, a Hindu may legally deal with his property so as to create a trust, a relation in many respects similar to, though not necessarily identical with, that known in English law as the relation of trustee and *cestui que trust*."

Further, he pointed out that it is only by treating them as trusts, for keeping up the worship, &c., that gifts to idols can be given effect to. Thus, for instance, in the case of *Sonatun Bysack v. S. M. Juggutsoonderee Dossee*,* the testator granted all his property to an idol. He said in his will:—"The whole of my aforesaid property I have granted to Sri Srijut Iswar Madanmohan Thakur, which I have established in the house, of which he is the malik or proprietor." From the will, generally, it appeared that the testator meant his family to have the beneficial interest in the estate after providing for the worship of the idol. Thereupon it was declared by the late Supreme Court, and subsequently by the Privy Council, not that the property vested in the idol with a beneficial interest in the sons, but that, according to the true construction of the will, the whole property was well given for the benefit of the testator's sons, &c., subject to their providing for the worship of the idol, &c. In the case of *Rajah Buddinath Roy v. Rajah Nursing Chunder Roy*,† in which a decree was made by the Supreme Court, on the 21st of August 1857, the testator by his will, dated 11th of January 1811, appointed his five sons "maliks," and directed that, after making "the disbursements mentioned below," they should divide the whole estate equally among them. One of the

* 8 Moore's Indian Appeals, p. 66.

† Unreported.

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“disbursements mentioned below” was as follows:—“For the service of Iswar Shamsundarji, the expenses shall be defrayed out of the profits of Talook Mirzapore, which shall remain as *dewutter*.” Although the talook is thus dedicated to the idol, the decree does not declare it to be the property of the idol. The decree declares “that the Talook Mirzapore in the said will is subjected to a special trust for the service of the idol, and that the defendant Narsing Chandra was and is a trustee of the said talook, &c., for the said service,” and it was ordered that Narsing Chandra should convey the talook to himself and certain other male members of the family, “so that the same may be held by them and their respective heirs as trustees for the idol and for the service thereof.”

And he added that, granting for the sake of argument that trusts are not expressly recognized by the old Hindu law, that was no reason why they should now be held to be invalid. “The Hindu law system is not and does not profess to be exhaustive; on the contrary, it is a system in which new systems and new propositions not repugnant to the old law may be engrafted upon it from time to time, according to circumstances and the progress of society.

“Fiduciary relations extend as the transactions and intercourse between men extend. In all probability trusts had by degrees sprung into existence before we find any record of them in our reports.

“I know no reason why it should be said that the testamentary power of a Hindu is limited to a simple declaration of the person whom he names his heir, or to a simple bequest or legacy in favor of an individual. Wills declaring trusts have always been recognized and acted upon by our Courts, just as readily as wills of the simplest description.

The question indeed seems to me to be practically concluded, so far as this Court is concerned, by a long course of practice, and many decisions, including several of the Privy Council. One of the latter is to be found in the case of *S. M. Soorjeemonee Dossee v. Denobundoo Mullick*,* where their Lordships held that a Hindu testator may give property, whether by way of remainder or by way of executory bequest, upon an event which is to happen (if at all) immediately on the close of a life in being. Their Lordships say :—‘Whatever may have formerly been considered the state of that law (*i.e.*, the law of Bengal) as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law, in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power; and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognized in practice. The law of India, at least the law of Bengal, has long been administered on that basis.’

“It appears to me that, after the repeated recognition and administration of trusts among Hindus, both by the Courts in India and by the Privy Council, it is impossible now to

* 9 Moore's Indian Appeals, p. 135.

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COOMAR
Tagore's
will.

say they ought not to have been recognized, because they are not expressly provided for by Hindu law."

Finally, in the case of *Tagore v. Tagore*, the subject was again considered. That suit* was brought by the only son and heir-at-law of the deceased, in order to have it declared that the trusts and limitations of the will, save so far as they concerned the payment of debts, legacies, and annuities, were void, inasmuch as they attempted to create estates and interests in property unknown to Hindu law and usage. The testator's intention, as manifested by his will, was described by the Judge who tried the case, in these words:—"He wished his property to go down and remain intact in certain alternative lines of descent designated by him, and springing from certain specified members of his family who might be living at the time of his death. In each line he desired that the property should be enjoyed for life only, by such members in succession as should be actually in being at his, the testator's, death; but on the decease of the last of these life-takers, he intended the whole property to become the inheritance of that man's eldest son."

No gift was made to his son and heir-at-law. He gave the whole of the property in the first instance to trustees, the ultimate trust being to hand over all the property to the person who, under the terms of the will, should become entitled to the inheritance.

Devises
upon trust.

With regard to the power of a Hindu to devise upon trust, it was held in appeal that, although the Hindu law contains no express provision upon the subject of uses or trusts, yet there was nothing contrary to its spirit and principles in a devise to trustees which gives a beneficial interest

* Ganendra Mohan Tagore v. Upendra Mohan Tagore, 4 Bengal Law Reports, O. C., p. 107, *coram*, Phear, J.

to a person to whom it might have been given by a simple devise without the intervention of trustees. The contention that all gifts or alienations upon trust are void, because the ancient Hindu law makes no express mention of them, is as futile at the present day, as it would be to deny to Hindus the possession of a testamentary power.

It was laid down, in *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*,* that a devise for a purpose which would be void as a condition would be void in the shape of a trust; and it was added in the *Tagore* case that a Hindu cannot, by the intervention of trustees, create any beneficial interest which he could not create in substance without the intervention of trustees. There may be no distinction between legal and equitable rights, or legal and equitable estates, but it is always possible that one person may have a certain beneficial interest to be derived out of an estate, and that another may have a right to the property out of which that interest issues. The holder of the property in that case is entrusted with the duty of securing to the other that beneficial interest to which he is entitled. He takes it subject to the trust.

"It is clear," said Sir B. Peacock, "that, under the Hindu law, a man to whom an estate is conveyed may not have the beneficial interest in the estate.† In the case cited below, it was held that, when a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of the Hindu law is in favor of its being a *benami* purchase; and although in the particular case the conveyance was in the English form of lease and release, the son in whose name it

* 2 Bengal Law Reports, O. C., p. 11; and see 4 B. L. R., O. C., p. 162.

† See the case of *Gopikrist Gosain v. Gungapersad Gosain*, Moore's Indian Appeals, Vol. VI, p. 53.

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was purchased, was declared to be a trustee for the father. So in *Doorga Persad Roy Chowdry v. Tara Persad Roy Chowdry*,* the Privy Council, on appeal from the Sudder Court, which was not a Court of Law distinct from a Court of Equity, held one man to be a trustee for another, though both were Hindus. See also *Rajah Nursing Deb v. Roy Koylas Nath*,† and the case of *Hurry Doss Banerjee v. Hogg*.‡ Numerous other cases to the same effect might be referred to if necessaryr."

(2) Whether particular estates can be created.

The second question which was raised for discussion was, whether a Hindu can by will create a qualified or particular estate, or must, if he devise at all, devise his whole bundle of rights. That also was dealt with in the case of *Tagore v. Tagore*. It was held that a Hindu testator may create a life-estate, and the Chief Justice added:—"I see no reason, having regard to the spirit and principle of the Hindu law, to think that particular estates cannot be created. If a testator can disinherit his son by devising the whole of his estate to a stranger, there seems to be no reason why he should not be able to divide his estate, by giving particular and limited interests in the whole of the property to different persons in existence, or who may come into existence during his life-time, to be taken in succession, as well as by giving his whole interest or bundle of rights in particular portions of lands included in his estates to different persons."

The Privy Council, moreover, in the case of *Rewun Persad v. Musst. Radha Beeby*,§ where all the devisees

* 4 Moore's Indian Appeals, p. 452.

† 9 Moore's Indian Appeals, p. 55.

‡ 1 Indian Jurist, O. S., p. 86.

§ 4 Moore's Indian Appeals, p. 137.

were in existence at the time of the testator's death, held that the widow took an estate for life, and that the two sons of the testator's brother each took a vested interest in a moiety of the estate so devised to the widow, expectant upon the termination of her life-interest therein.

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The third question is, whether a Hindu can by his will create a perpetuity. I have already referred to Sir Barnes Peacock's judgment in Bourke's Reports, in which he was understood to mean that, as Hindu law did not contain any rule on the subject of perpetuity,—a Hindu testator, not being bound by the English rules, was freed from all restrictions. That construction of the judgment turned out to be erroneous, but it was probably the cause of the fantastic and extraordinary dispositions which Hindus have recently aimed at making by their wills.

(8) Whether perpetuities can be created.

The subject of perpetuities came on again for discussion, after a considerable interval, in the case of *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*.*

In his judgment in that case, Sir Barnes Peacock said, alluding to his judgment in Bourke's Reports, that he had been supposed to have laid down that the rule of English law against perpetuities was not binding in the case of a Hindu will. But he now declared :—" I certainly never intended to lay that down as a general proposition. All that I meant to say was that the English law against perpetuities could not be engrafted upon a Hindu will. Whether the Hindu law warrants the creation of a perpetuity, either by will or a deed of gift *inter vivos*, must depend upon the Hindu law alone, and not upon the Hindu law supplemented by English law." Further, he said :—" The Judicial Committee appear to us to have determined the

* 2 Bengal Law Reports, O. C., p. 34.

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question of perpetuity in *Juggutsoondery's case*.^{*} Sir James Colville, in his judgment in that case, gave effect to the rule against perpetuities. The Privy Council did not expressly refer to the question, but reversing the decree, commenced by stating that it is not improper to observe that, with reference to the testamentary disposition by Hindus, the extent of this power must be regulated by the Hindu law."

Again, in the case of *Tagore v. Tagore*, the question arose whether the devise in the will infringed the rule of law against perpetuities. It was contended that some of the devises were executory devises, or contingent remainders, but Hindu law knows nothing of either the one or the other. There is no distinction by Hindu law between freehold estates and estates less than freehold, nor can the law of executory devises, which it is said were† not regularly admitted in England earlier than two centuries ago, be applicable to cases governed by the Hindu law. The rules against perpetuity were no part of the original Hindu law, nor at the date of the judgment had such rules been established by legislation or judicial decision. On the contrary, the Privy Council‡ had expressly declared, and the Chief Justice again enforced the doctrine, that it would be to apply a very false and mischievous principle if it were held that the nature and extent of testamentary disposition by Hindus could be governed by any analogy to the law of England. The law of England is concerned with a system of the most artificial character, founded in

* 8 Moore's Indian Appeals, p. 66.

† Fearne's Contingent Remainders, p. 428, note.

‡ Musst. Bhoobun Moyee Debi v. Ramkishore Acharj Chowdry, 10 Moore's Indian Appeals, p. 308.

a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society, differing as far as possible from that which prevails among Hindus in India. And in the case* to which I have frequently referred, the Privy Council expressly declared, and the declaration has finally worked its way to general acceptance, that "the extent of the testamentary power of disposition by Hindus must be regulated by Hindu law."

* *Sonatun Bysack v. S. M. Juggut Soonderee Dossee*, 8 Moore's Indian Appeals, p. 85.

LECTURE XIII.

THE LAW OF WILLS.

Who are capable of disposing by will—Four divisions of the subject—Execution of wills—Nuncupative wills—Signature of testator—Attestation—Hindu Wills Act on the execution of wills—Changes effected by that Act—Probate—Jurisdiction of Court to grant probate—Founded on the voluntary application for its grant—Probate does not confer title on the executor—Effect of the Hindu Wills Act upon probate—Power of an executor—Power of an administrator—Position of executor and administrator under the Hindu Wills Act—His rights—And duties—Executor *de son tort*.

Who are capable of disposing by will.

WILLS are generally considered to be of indigenous origin in Hindustan, and the nature and extent of Hindu testamentary power are held to be regulated by the Hindu law.

The Hindu Wills Act has rendered applicable to Hindus the following sections of the Indian Succession Act, which describes the persons who are capable of disposing of their property by will :—

Section 46.—Every person of sound mind, and not a minor, may dispose of his property by will.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a will during an interval in which he is of sound mind. LECTURE
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Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

Section 48.—A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Section 49.—A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Four subjects still remain to be considered,—*viz.*, the mode in which that power may be exercised; the effect of probate and the position of executors; the rules of construction when a will is in writing; and the class of persons in whose favor testamentary dispositions of property may be made. They also must be regarded from the point of view in which Hindu law would have regarded them,—that is, they must be considered relative to principles to be found in or directly deduced from that law. Four divisions of the subject.

With regard to the formalities necessary to the due execution of a will, inasmuch as such an instrument is nowhere mentioned by the earlier authorities, there is of course a total absence of all directions upon the subject. The general principle is that in no instance does Hindu law require a writing as essential to the validity of a transaction; although it recognizes the importance and desirability of preserving written evidence of it. Nuncupative wills are frequent amongst Hindus, and are constantly upheld when clearly proved. Execution of wills.

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Nuncupative wills.

And the High Court of Madras,* dealing with this subject, denied that, because a doctrine has been incorporated into the Hindu law, from the law of a foreign country, it followed that, as a necessary consequence, the whole of the foreign law relating to the subject-matter must be imported with it. When such introductions take place, they said, so far as it can be done, the foreign matter must be moulded according to analogies derivable from the indigenous law. "There is no transaction of Hindu law which absolutely requires a writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally; and it would be singular, if we were to attempt to rule, that all other expressions of will are valid, when delivered by word of mouth, but that the expression by a man of his will as to the disposition of his property after his decease, shall be wholly invalid, unless reduced to writing."

Signature
of testator.

Again, there is no provision of Hindu law† which renders the signature of the testator indispensable to the validity of a Hindu will. No formalities whatever are required in the execution of a will by a Hindu. All that is necessary to be shown is that the will is a complete instrument, and that it expresses the deliberate intentions of the testator.

Attestation. Further, in a case‡ which came before the High Court of Bombay, it was objected that a Hindu will had not been

* *Crinivasammal v. Vijayammal*, 2 Madras High Court Reports, p. 87; and see *Vallivyagam Pillai v. Pacha*, 1 Madras High Court Reports, A. C., p. 326.

† *Vinayak Narayan Jog v. Govindrav Chintaman Jog*, 6 Bombay H. C. Rep., A. C. J., p. 224.

‡ *Mancharji Pestanji v. Narayan Lakshumanji*, 1 Bombay H. C. Rep., O. C. J., p. 77, 2nd edition. Section 3 of the Act quoted runs thus:—"And it is hereby enacted that this Act shall only extend to the wills of persons whose personal property cannot, by the law of England, pass to their representatives without probate or letters of administration ob-

attested according to English law. Couch, J., said :—“ The law of wills is part of the law of inheritance and succession. The English law as to the execution and attestation of wills did not, before Act XXV of 1838, apply to the wills of Hindus and Mahomedans; and they are by the 3rd section of that Act exempted from its operation.”

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Before the Full Bench it was contended that, as devises were unknown to Hindus, the power of making a will, borrowed from the English law, could only be exercised with those accessories of signature and attestation rendered necessary by the statute of Charles II., which, with the other then existing statute law, was introduced into Bombay in 1726 on the establishment of the Mayor's Court. It was further contended that immoveable property in India must be considered to rank with real property in England, and thus to be devisable only by a will duly attested by three witnesses. The Supreme Court said :—“ We think it would be difficult to maintain the proposition that Hindu immoveable property, and what is technically known as real property in England, are identical in their nature. The descent of Hindu immoveable and moveable property as a general rule is the same—the person entitled to one is entitled to the other; whilst real estate in England goes in one line of descent, and chattels, real or personal, may go in another. Each class of Hindu property is primarily liable to debts in execution, whilst the contrary doctrine prevailed in respect of English real property. So an administrator or executor of a Hindu estate takes both moveables and immoveables; whilst the executor or adminis-

tained in one of Her Majesty's Supreme Courts of Judicature, and that the statutes and parts of statutes aforesaid are only repealed as far as they relate to the succession to the property of such persons.”

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trator in England takes only the personalty, or moveable property; free-hold, or immoveable property, goes to the heir. It is impossible to illustrate by any of our English tenures the exact nature of Hindu immoveable property."

The Court called for and received from the ecclesiastical registrar a return of all wills executed by Hindus, and filed in his office from 1820 to 1860. It appeared that 418 wills were filed within that period, of which 283 were attested by three witnesses; 114 by two witnesses; 11 by one witness; and 10 without any witness whatsoever. Of the 135 wills attested by less than three witnesses, it appeared from the wills and the inventories filed that 102 at least referred to immoveable property. The Court considered that a powerful argument arose from the great public inconvenience which would result from a decision that Hindu wills required to be attested by three witnesses; the effect of which would be that no less than 102 of the 418 wills would be declared to be either wholly or partially void. They considered it too late, even if there were no other reason, to reverse the practice of the Court for forty years, and thus to unsettle the titles to the large amount of property covered by those 102 wills.

Hindu Wills
Act on the
execution
of wills.

The inconvenience of allowing so large a portion of the law relating to Hindus, as that which regulates testamentary succession, to depend upon the manner in which different Courts of co-ordinate jurisdiction might in their several discretion "mould the foreign doctrines upon the subject according to the analogies derivable from the indigenous law," led at length to legislation upon the whole subject. The Hindu Wills Act* was passed in 1870, five years after the Indian Succession Act had become the law of the

* Act XXI of 1870.

land. Its object was to provide rules for the execution attestation, revocation, revival, interpretation, and probate of Hindus in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay.

It provided that a large portion of the Indian Succession Act,—that is, those parts which relate to wills and codicils, to their proper execution and due construction, their probate and the carrying out of their directions,—should apply (1) to all wills and codicils made by any Hindu on or after 1st September 1870, within the said territories, or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; (2) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories and limits.

These important provisos, however, are added

(1) That marriage shall not revoke any will or codicil.

(2) A testator shall not acquire authority by the Act to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right to maintenance which he could not but for the Act have deprived them of.

(3) No property shall vest in an executor or administrator with will annexed, which the testator could not have alienated *inter vivos*.

(4) The law of adoption and of intestate succession shall remain unaffected by the Act.

(5) No Hindu shall acquire authority to create in property any interest which he could not have created before 1st September 1870.

LECTURE
XIII.Changes
affected by
that Act.

The changes effected by that statute in the law which regulates the mode in which a Hindu will shall be drawn up and executed are considerable.

In the first place it apparently abolishes within the territories, subject to the operation of the Act, nuncupative wills from the date mentioned in the Act. The Sections in the Indian Succession Act relating to privileged wills, which alone could be by word of mouth, are not by the Hindu Wills Act made to apply to the case of Hindus. The only Sections* made applicable to them provide that a testator

* Sections 50, 51, 55, 57, 58, and 59 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, are as follows :—

50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules :—

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person ; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

51. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

55. No person, by reason of interest in or of his being an executor of a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

must execute his will by signing or affixing his mark to his will, or by authorizing some other person to sign for him in his presence. Such signature or mark, whether of the testator or of the person who signs for him, must be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

And with reference to attestation, it is now the law that a Hindu will, affected by the Hindu Wills Act, must be attested by two or more witnesses, each of whom must have seen the testator duly execute the will by himself, or by

57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same.

58. No obliteration, interlineation, or other alteration made in any unprivileged will, after the execution thereof, shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

59. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should, at the time of doing that act, be in a situation which entitles him to make a privileged will.

LECTURE
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his deputy, or have received from him a personal acknowledgment of its due execution. The witnesses, however, need not sign in presence of each other, but each of them must sign in presence of the testator. No particular form of attestation is necessary.

If such* will be afterwards revoked, it shall not be revived otherwise than by the re-execution thereof, or by a codicil duly executed and shewing an intention to revive the same. If there be a revocation of part, and afterwards of the whole, and then a revival be made, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole, unless a contrary intention shall be shown by the will or codicil.

Probate.

With regard to probate of a will or codicil, it has frequently been granted by the Courts on a voluntary application by an executor. But he was not by Hindu law, before the Hindu Wills Act, compellable to take out probate. The will in his possession, or in possession of a devisee or of a stranger, could not, according to some authorities, be called for with a view to compelling the holder of it to prove it in solemn form.

Jurisdiction of Court to grant probate.

In a matter† pending before the Madras High Court, in which the due execution of an alleged will was in dispute,

* Section 60 says:—No unprivileged will or codicil, nor any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

† In the matter of *Tiravalur Kiristuppa Mudali's* pretended will, 1 Madras H. C. Rep., p. 59.

a motion was made for a citation to the alleged executors of a Hindu will to bring it in and leave it in the registry, and to prove the same in solemn form. The High Court said:—"There is no doubt that the Court has power to grant probate of a Hindu will if applied for; but it has, I believe, always been held that a Hindu executor could not be compelled to bring in a will and prove it in solemn form. It is not incumbent upon the representative of a Hindu to take out administration or probate, except in the case provided for in Act XXVII of 1860, Section 2; and even then he need not procure the certificate, probate, or letters of administration where the Court is of opinion that payment of a debt due to the estate is withheld from fraudulent or vexatious motives, and not from a reasonable doubt as to the party entitled.

"There seem, no doubt, to have been two cases in which an application resembling the present was granted by the Supreme Court; but, in the first, the point as to jurisdiction does not seem to have been mooted, and though the paper was brought in, nothing further seems to have been done. In the second, the application was by the executor himself, quite a different case from the present, where we are asked to direct a citation against the executor. Neither of these cases then can be regarded as an authority for granting the present application. On the other hand, there is *Chellammal v. Garrow*,* a direct decision on the subject, where it was held that natives, representatives of a deceased native, are not bound to take out letters of administration, in order to be entitled to sue in favor of the estate, or to act as representatives of the intestate; nor would the Supreme Court in any

* 2 Sir T. Strange, N. C., p. 1.

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instance cite or use any means towards compelling natives to come in and prove wills, or take out letters, or grant them to creditors, to the prejudice of the next of kin. In Calcutta, we find from the case *In the goods of Hadje Mustapha*, quoted from Hyde's Notes, in 1 Morley's Digest, p. 245, that 'probate of wills was formerly granted to the executors of Hindus and Mahomedans conformably to the practice of the Mayor's Court, until the Statute 21 Geo. III arrived in India, when it was refused.'

Founded on
the volun-
tary ap-
plication
for its
grant.

"I think it clear that it is optional with the Hindu executor whether he will prove the will or not. The Court has no jurisdiction to compel him to do so. If he set up the will in a suit, its validity would be tried just as is the case in England, when a will relating only to realty, and therefore not requiring probate, is set up by some one claiming under it. It is a totally different matter when the executor has actually applied for probate, and thus submitted himself to the ecclesiastical jurisdiction. Then I think the next of kin have a right to compel him to proceed and prove the will."

In the goods of Rempriah Dossee,* the Supreme Court of Bengal held that it was not necessary to prove the wills of Hindus and Mahomedans. Still, if probate was applied for, the case must be judged by rules applied to the wills of British subjects. It was the invariable practice, they added, in the case of a testator or testatrix unable to write his or her name, to require a *viva voce* examination, at all events if the will was impeached. "Any of the next kin were entitled as of right to call for the formal proof of the will."

Again, *In the goods of Balkrishna Ganpaty*,† the nearest of kin of a deceased Hindu applied to the High Court of

* Morton, p. 79.

† 1 Bombay H. C. Rep., O. C. J., 2nd ed., p. 114.

Bombay in its testamentary and intestate jurisdiction, claiming a right to inspect certain testamentary papers of the deceased in the possession of a stranger. It had previously been decided by the High Court of Madras that a Hindu could not be compelled to bring in and prove an alleged will. In this case the Court ordered that the stranger referred to should deposit the testamentary documents admitted to be in his possession in the hands of the officer of the Court, and that the applicant should have an opportunity of inspecting and taking a copy of them, with a view to any further proceedings which he might be advised to adopt.

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Probates were always granted of Hindu wills, the applicants being treated as persons who voluntarily submitted themselves to the jurisdiction. But probate, when granted, could not, and did not, operate as evidence against third parties, or give a title to the executor or against them. Only those who were parties to the proceeding in which the probate was obtained were bound by it.

Position of
executor
and admin-
istrator
under the
Hindu
Wills Act.

The probate of an English will is, according to English law, evidence to all the world of the executor's title to personalty. The Ecclesiastical Court in England had the right of possession and administration of the estate of the deceased. By granting probate to the executor, it thereby granted to him that right of possession and administration. An English will was inoperative to grant that right, for the right of the Court was paramount; but the title of a Hindu executor is founded simply and solely on the will of the testator considered as an instrument of gift.

The High Court of Bengal expressly stated, in the case of *Sharo Bibi v. Baldeo Das*,* that, as respects Hindus, it had no inherent right of possession and administration, and its

* 1 Bengal Law Reports, O. C., p. 24.

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probate of a Hindu will, when taken, is no grant of title; and as evidence of title, it stands on the same footing as every other decree *in personam*,—that is, it is conclusive as against the parties to the suit in which the decree is made and no others. Probate of a Hindu will is no more proof of the executor's title to personalty than, under the English law of evidence, it is proof of the title to land or of the due execution of a power.

Effect of
the Hindu
Wills Act
upon
probate.

But, under the Hindu Wills Act, the duty of taking out probate of a will, and the effect of probate, when granted, have been defined by the Legislature. It is necessary, in reference to all wills governed by that enactment, that probate should be obtained, although letters of administration are not required if a Hindu dies intestate. "Noright," it is enacted by Section 187 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, "as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under section 180,"—i. e., with a copy of the will annexed. A similar section, with regard to rights in the property of an intestate not being established, until letters of administration have first been granted, has not been made applicable to Hindus by the Hindu Wills Act. When, however, such letters are granted, they "entitle" the administrator to

* The other chief sections, which relate to the law of probate and of letters of administration, are as follows:—

181. Probate can be granted only to an executor appointed by the will.

182. The appointment may be express or by necessary implication.

183. Probate cannot be granted to any person who is a minor, or is of unsound mind, nor to a married woman, without the previous consent of her husband.

all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death."

Again, a Hindu is now compellable "to produce* and bring into Court any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person." So far from it being at the present time optional with a Hindu whether he will take out probate, or from it being, if he does, a voluntary submission to a jurisdiction to which he is not legally amenable "if it* be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the know-

184. When several executors are appointed, probate may be granted to them all simultaneously, or at different times.

185. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will. If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

186. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

188. Probate of a will, when granted, establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

189. Letters of administration cannot be granted to any person who is a minor, or is of unsound mind, nor to a married woman, without the previous consent of her husband.

191. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

192. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

* See Section 237.

LECTURE
XIII.

ledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same, and such person shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions, or not bringing in such paper or writing, as he would have been subject to in case he had been party to a suit, and had made such default, and the costs of the proceeding shall be in the discretion of the Judge."

And the conclusiveness of probate or letters of administration, for the purpose of proving a will, or the representative character of an alleged executor or administrator, is also provided. Section 242 says:—"Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted."

Powers of
an execu-
tor.

Besides, the formalities attending the execution of a Hindu will, the necessity or otherwise of obtaining probate, and the effect of probate when granted, there is also another subject which must be regarded according to Hindu law,—viz., the powers inherent in the office of executor of the will, or administrator to the estate of a deceased Hindu. Each stands in the position of an ordinary manager, his

powers being those which are incident to that position, unless in the case of a will they are by the terms thereof restricted or enlarged. An executor moreover takes no estate in his capacity of executor; the title to the estate of the deceased vests in him as trustee thereof, only so far as the testator has so directed.

In a case* reported in Bourke's Reports, it appears that the widow of a deceased Hindu sued to set aside a certain deed of mortgage which had been created by the attorney or executor under the will of her husband. The High Court of Bengal held that an executor, according to Hindu law, has not the same power over the moveable and immoveable estate of his testator which an executor would have over leasehold estate according to English law. They held that the executor of a Hindu will has no greater power over immoveable estate than a manager, who, according to the decision of the Privy Council, in *Hunoomanpersad Panday v. Mussamut Babooee Munraj Koonwar*,† has only a limited and qualified power. "It can only be exercised rightly in a case of need, or for the benefit of the estate." Further, the general power of a manager may be enlarged or restricted by the terms of the will under which he acts. They held further that a direction to sell houses to meet certain specified demands, and to invest the surplus, does not justify an executor in mortgaging, especially at a high rate of interest.

Again, in the case of *Srimati Jaykali Debi v. Shibnath Chatterjee*,‡ certain Government promissory notes, belonging to the estate of a deceased Hindu, were endorsed over

* *Sreemutty Dossee v. Tarachurn Koondoo*, Bourke's Rep., O. C. J., p. 48.

† 6 Moore's Indian Appeals, p. 393.

‡ 2 Bengal Law Reports, O. C. J., p. 1, *per* Phear, J.

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Again, Mr. Justice Colville in the same case thus described the position of a Hindu administrator:—

“An administrator of a Hindu estate cannot I think be assumed to have powers and rights co-extensive with those of an administrator of a European’s estate. The latter (where those entitled to him in preference being duly cited omit to take out administration) obtains letters of administration, by virtue of which he becomes, to all intents and purposes, and exclusively, the legal personal representative of the intestate; and inasmuch as up to the date of the grant, there has been no such legal representative, his interest does not vest merely at and from the time of the grant, but is for most purposes carried back by relation to the time of the intestate’s death. Letters of administration were not until the passing of Act XX of 1841 essential to the title of the representative of a Hindu intestate for any purpose. That Act seems to me rather to be designed in aid and for the security of debtors than to make any alterations in the nature of succession and representation among Hindus. It says that, except in cases where the opposition is obviously frivolous, no debtor to the estate shall be compelled to pay to a person not clothed with letters of administration, or a certificate obtained under that Act; and that a debtor shall in all cases be safe in paying to a person acting under letters of administration, or a certificate duly obtained. But it does not cast upon the next of kin of a Hindu intestate the obligation of perfecting his title to representation by letters of administration, or a certificate, so as to enable (upon his failure so to do) any other person to acquire that exclusive character. It does not say that, until administration or a certificate is taken out, the estate of the intestate shall be treated as

unrepresented, and thus afford a ground for the application of the doctrine of relation derivable from the English law of succession." LECTURE
XIII.

The effect of the Hindu Wills Act is entirely to alter the position of a Hindu executor or administrator. He becomes the statutable representative of the deceased, all whose property is vested in him by force of the Act. Position of
executor
and admin-
istrator
under the
Hindu
Wills Act. Instead of his managership being defined and limited by the terms of the will, Section 179 of the Indian Succession Act made applicable to him by the Hindu Wills Act, says:—
“The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.” And further,* “the appointment may be express or by necessary implication.”

And with regard to the rights of an executor or administrator, he has† the same power to sue in respect of all causes of action that survive the deceased; and to distrain for all rents due to him at the time of his death, as the deceased had when living; and also has power‡ to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit. He is bound,§ within His rights
And duties. six months from the grant of probate or letters of administration, to exhibit in the Court which granted the same, an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character; and shall

* See section 182.

† See section 267.

‡ See section 269.

§ See section 277.

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XIII.

in like manner, but within twelve months, instead of six, exhibit an account of the estate, showing the assets that may have come to his hands, and the manner in which they may have been applied or disposed of.

Executor
de son tort.

With regard to executors *de son tort*,—that is, persons who have taken possession, or dealt with the assets of the deceased, and who are therefore presumed by English law to have a will of the deceased in their possession, on the authority of which they are acting,—the Hindu law makes no provision, and raises no presumption. Although it has been held that a Hindu may make a will, there is no legal presumption under any circumstances that he has done so. Those who after his death take his goods may be thereby rendered liable to pay his debts upon the ordinary principles of the law, without any resort to fanciful presumptions. It has not, however, been absolutely so decided.

In a suit by a creditor of a deceased debtor, the defendants* were the widow and half-brother of a deceased debtor. It was urged that, according to Hindu law, they were not liable to be sued for the debts of the deceased, or at any rate the male defendant was not. It appeared however that he had received and dealt with the assets of the deceased. The Appellate Court said:—"We do not think it necessary to say whether the defendant is an executor *de son tort*. If he has taken the estate of his brother, and has become his representative, it appears to us that he ought to pay his debts, and it is not denied that the assets are enough to pay the plaintiff. It is laid down by the Hindu law that it is the duty of every man to pay his debts, and that a son is bound to pay his

* Jagendur Narain Debroykut v. Emily Temple, 2 Ind. Jur., N. S., p. 234.

father's debts out of the assets of the estate. If a person takes an estate as heir of the deceased, he is under an obligation to pay the debts of the deceased. It is not necessary for us to go to the full length of saying that any stranger who wrongfully takes another's estate is bound to pay his debts. We confine our remarks to the present case in which the defendant is the reversionary heir, and has taken possession during the widow's life-time. In the case of an entire stranger, it might be necessary to make the heirs parties." It also appeared in this case that the widow had chosen to abandon her own rights, and to put the next heir into possession, and it was pointed out by the Court that the next heir so coming in would, according to Hindu law, become absolutely the next heir to the deceased.

LECTURE XIV.

CONSTRUCTION OF WILLS.

Rules of construction—Effect must be given to the intention—Hindu will must be construed in reference to Hindu law—Construction of words of gift—Disinheritance—Doctrine of the Privy Council—*Soorjeemonee Dossee v. Denobundoo Mullick*—*Prankisto Chunder v. Sreemuttee Bamasoondery Dossee*—*Bissonath Chunder v. Sreemuttee Bamasoondery Dossee*—Rulings of the Madras High Court—*Tagore v. Tagore*—Rules of construction provided by Hindu Wills Act—What class of persons may take under a will—Provisions of Hindu Wills Act upon that subject.

Rules of
construction.

I ENDEAVOURED, at some length, in a former lecture, to explain the extent of the testamentary power as it exists amongst Hindus. That power is derived from their own law, and is limited and controlled by it. As a general rule, every Hindu who can aliene absolutely while living can also aliene at his death. The character and extent of the disposition which he may make depend upon the extent of the proprietary right which his personal law recognizes him to possess; and also upon the state of that law, with respect to the exercise of the power of the alienation. So also with regard to the construction to be put upon the written words of a will. It must be construed in reference to Hindu law, both of alienation and inheritance.

Effect must
be given to
the inten-
tion.

The primary rule is that “the Court ought to gather the intention of the testator from that which the will expressly or by implication declares. This rule is just as applicable

to the wills of Hindus as to those of persons of other religions."* In all cases effect must be given to the intention, which can only be gathered from the legal and intrinsic signification of the words used.†

LECTURE
XIV.

A Hindu will must be considered to take effect from the time of the testator's death, and not from the time of its execution.‡

The rules of construction§ cannot be strained to bring a devise within the rules of law. In the latter of the two cases cited below from English reports, the Master of the Rolls said:—"We must adhere to the words of the testator, unless we are warranted by the context in putting a different meaning on them."

The rules of law within which the construction of a Hindu will must be confined are the rules of Hindu law. A Court is not justified in construing such a will by any reference to the principles of a foreign law, or by any reference to usages and customs which are not shown to be adopted and used by Hindus. This caution is especially necessary, when dealing with those wills of Hindus which are drawn in English form, and with the use of English legal phraseology.

a Hindu will
must be
construed
in reference
to Hindu
law.

I shall give a few illustrations of the manner in which the Courts deal with Hindu wills; my object being merely to explain the principles upon which they proceed, not to enter into minute details upon a branch of law, which, in

* *Per* Sir B. Peacock, C.J., in *Tagore v. Tagore*, 4 B. L. R., O. C., p. 176.

† *Mussamut Bhoobun Moyee Dabi v. Ramkishore Acharj Chowdry*, 10 Moore's I. A., p. 297.

‡ See *Tagore v. Tagore*, 4 B. L. R., O. C., p. 175.

§ 4 B. L. R., O. C. J., p. 189; *Leake v. Robinson*, 2 *Merivale's Reports*, p. 390; *Griffiths v. Green*, 1 *Jacob & Walker*, p. 33.

LECTURE
XIV.

its practical operation, gives rise to innumerable questions.

It will be useful to cite one or two passages from the judgment of Sir Barnes Peacock, in the case of the Tagore will, with the view of showing the necessity of adhering to the words of a Hindu will to be read in reference exclusively to the provisions of Hindu law. In one passage* he says :—

“ The Hindu law of inheritance is based upon the Hindu religion, and we must be cautious that, in administering Hindu law, we do not, by acting upon our notions derived from English law, inadvertently wound or offend the religious feelings of those who may be affected by our decisions ; or lay down principles at variance with the religion of those whose law we are administering.†

“ To introduce our artificial system, and engraft it upon the Hindu law for Hindus (even if we were permitted to do so), would create the greatest injustice and the greatest inconvenience. We should introduce a system wholly unknown to the Hindus and to the greater part of our Judges in the mofussil who have to administer the Hindu law, and we should cause such uncertainty that no man would know what his rights were, and no lawyer could safely advise him upon the subject. Lord Bacon, speaking of the Statute of Uses, called it ‘ a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort that it was hard to say which barque will sink, and which will get to the haven,—that is to say, what assurances will stand good, and what will not.’ If the Hindu law as to gifts by will is more strict and limited than the English law of devises, the restriction tends to the benefit

* 4 B. L. R., O. C., p. 169.

† See *Mullick v. Mullick*, 1 Knapp, p. 247, *per* Lord Wynford.

of heirs-at-law, and of those members of Hindu families, for whom, in the absence of a will, provision for maintenance was made. The Hindu law of inheritance and maintenance is more consistent with the Hindu religion than any rules which could be adopted by analogy to the English law of primogeniture of entails, of executory devise, or of contingent remainders."

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And in another passage, he adds : *—

" Primogeniture, as a rule of inheritance, is unknown to the Hindu law, and its introduction would be entirely opposed to the principle of which equality among the heirs is the spirit.† Primogeniture and singleness of heirship would also destroy partition of estates, which is favoured by the Hindu law, as spiritual benefits are multiplied by partition."

Again, with regard to the construction of gifts in a Hindu will,‡ he says :—

Construction
of
words of
gift.

" A gift to a man and his sons and grandsons, or to a man and his son and sons' sons, would, in the absence of anything showing a contrary intention, pass a general estate of inheritance according to Hindu law.

" I believe the words usually used in Bengal are *putra pau-tradi krama* ; and in the Upper Provinces, *naslan baad naslan* ; the literal meaning of the former being to sons, grandsons, &c., in due succession ; and of the latter in regular descent or succession.‡

* 4 Bengal Law Reports, O. C., p. 172.

† See the judgment of the Privy Council, in the case of *S. M. Soorjeemonee Dossee v. Deenobundoo Mullick*, 6 Moore's I. A., p. 555. " Equality among the heirs," said Lord Justice Turner, " is, as we understand, the spirit of that law." See *Dayabhaga*, Chap. III, Sec. II, verses 24—27.

‡ *Tagore v. Tagore*, 4 B. L. R., O. C., p. 182.

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"A gift by will of an estate to a man under the Hindu law, even without any words of limitation, would convey a general estate of inheritance in the absence of words showing a contrary intention. But if a will should be made by gift or conveyance to a man, or to a man and his sons and sons' sons, and words should be added that the elder heir should always be preferred to the younger, and that every elder son of each heir in succession by descent, and his issue or heirs male by descent, should be preferred to every younger son, or his issue, or heirs male by descent, to the exclusion of females and their descendants; and that in default of sons or sons' sons, the estate should go over to a third person and his heirs, such a gift could not, without doing violence to language, be construed as expressing an intention to vest in the donee a general and absolute estate of inheritance, alienable at pleasure, and descendible to all heirs according to Hindu law, lineal or collateral, male or female, as the case might be."*

Disinheri-
son.

And again, with reference to the mode in which disinherison can be effected, although it expresses an elementary rule, yet, as it was necessary to lay down the law distinctly upon the point in a case of extreme importance, I may cite the passage here:—

"An heir at-law† ought not to be disinherited without an express devise over or necessary implication: mere negative words are not sufficient to exclude him without an actual gift to some other definite object; and if that actual gift is one which the law does not allow, it ought not to be interpreted to mean something which the testator never intended, so as to disinherit the heir, and to deprive him of

* Tagore v. Tagore, 4 B. L. R., O. C., p. 183.

† *Ibid*, p. 187.

his just rights. A mere expression in a will that the heir-at-law shall not take any part of the testator's estates is not sufficient to disinherit him, without a valid gift of the estates to some one else. Still less can an heir-at-law be disinherited by words expressing that he is not to take any benefit under the will. He will take by descent and by his right of inheritance whatever is not validly disposed of by the will, and given to some other person."

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The judgment of the Privy Council, in the case of *Soor-jeemonee Dossee v. Denobundoo Mullick*,* is frequently referred to with regard to the construction of Hindu wills. It was delivered in an appeal from the late Supreme Court at Calcutta. One contention was that the income of the estate of a testator (who died, leaving five sons), which accrued between the time of his death and the death of one of the sons, was the joint estate of the five brothers, and that the widow of the deceased son was entitled to her share of that income. It was contended on the other side that, by virtue of the gift over contained in the will, the income passed with the principal to the four surviving brothers. The question therefore depended entirely upon the construction of the will. In reference to that subject, the Privy Council made the following observations:—"In determining that construction what we must look to is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be con-

Doctrine of
the Privy
Council.

* 4 S. W. R., P. C., p. 114.

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sidered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances; and when this is the case, these circumstances must no doubt be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or that effect, unless the language of the will or the surrounding circumstances displace that assumption."

*Soorjee-
monce
Dossee v.
Denobundoo
Mullick.*

In the will before the Council, there was an absolute gift of one-fifth of the testator's property to each of his five sons. A later passage of the will directed that, in the event of any son dying without male issue, his share should go over to his surviving brothers, or their male issue. Construed literally, the testator in one passage gave to his sons absolutely, in another contingently. Presumably, he must have intended that those to whom he gave absolutely should at least enjoy the income of their shares; and where a testator has once evinced an intention to give his property absolutely, very strong and clear language must be required to countervail that intention, and subject the property which he has once given to his further disposition. Such language was nowhere employed.

As respects the extrinsic circumstances, they could not be said to disprove the expressed intention. The parties no doubt were joint in estate; and in that case, by Hindu law, the increment follows the principal; but that could not affect the case, unless the testator could in law and had in

fact imposed upon them the obligation to continue joint in estate. The Judges in the Court below considered that it was more consonant to the principles of Hindu law to hold that the increment should go over with the principal, than that it should pass to the natural heirs. The Privy Council, however, pointed out that Hindu law prescribes equality among heirs, and does not treat the principal and the increment as undistinguishable in their nature, for there is no doubt they may be severed: but it treats them as united for the purpose of dividing them equally amongst all the united family,—that is, all the heirs.

Again, in the case of *Prankisto Chunder v. Sreemuttee Bamasoondery Dossee*,* the question was upon the construction of a will. The Privy Council, in their judgment, held that the meaning of a testator was to be ascertained by the words which he had made use of, having regard to the laws which prevail in India relative to the subject of disposition. He directed his sons, using the words “living jointly in respect of food,” to take care of and look after his property, moveable and immoveable, and carry on his trading business. Their Lordships observed that the interest thus given to the sons was not in the nature of an English joint estate, nor was it similar to that taken by the executors of an English will to whom the testator has given his property for the purpose of carrying on his trade. The will in this case directed that, if one of the sons had died, leaving a son, the share of the son so dying would have gone to his son, or, in other words, to the grandson of the testator. It was only in the event of his son not leaving a son that the testator directed that his share should go to the survivors. The Privy Council considered that

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*Prankisto
Chunder v.
Sreemuttee
Bamasoon-
dery Dossee.*

* 9 S. W. R., P. C., p. 1.

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such construction was not lightly to be inferred, but that the testator's intention had been distinctly expressed. The share which each son took if he died, leaving no son, was directed to go to the other sons.

Then the question arose whether the share of profits made during the joint lives of the sons, which belonged to the deceased son, followed his share of the capital, and went over to the other sons. The testator gave no direction to accumulate. In *Sonatun Bysack v. Sreemutty Juggut Soondery Dossee*,* there was an express direction to accumulate. Here there was none; and that being so, a share of the profits belonged to the son, and the testator had no power of disposing of it. If he had attempted to dispose of those accumulations, the question might have arisen whether such a direction was valid or not. The Privy Council concurred with Sir Barnes Peacock that the testator had not attempted to dispose of, and if he had, could not effectually have disposed of, the property of his son.

*Bissonauth
Chunder v.
Sreemuttee
Bamasoon-
dery Dossee.*

In the case of *Bissonauth Chunder v. Sreemuttee Bamasoon-dery Dossee*,† a Hindu by will had directed his sons, using the words "continuing joint in food," to look after and take care of his property, moveable and immoveable, and carry on his trading business. The question was how the profits of the trade were to be divided among the persons pointed out by the testator. In the former case of *Soorjee-monee Dossee v. Denobundhoo Mullick*,‡ the will directed that one-fifth should be given to each son, and if the son died without male issue, the one-fifth should be given over. In the will in this case it was directed that the share of each son

* 8 Moore's Indian Appeals, p. 66.

† 12 Moore's Indian Appeals, p. 41.

‡ 6 Moore's Indian Appeals, p. 526.

was, in the case of his dying without male issue, to go to the other sons; and it was disputed whether the share of profits made during the joint lives of the sons, which belonged to the deceased son, followed his share of the capital, and went over to the other sons. As there was an absence of any direction to accumulate, the Privy Council held that the deceased's share of the accumulations was not affected by the will, but passed according to the law of inheritance.

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In the case of *Armugam Mudali v. Amini Ammal*,* the Madras High Court said that it would be improper and very unsafe in construing Hindu wills to follow the decisions of English Courts upon the construction of English wills, which are founded upon the peculiar effect ascribed to technical words and to terms ordinarily used by conveyancers, with reference to the real property law of England. A "direction to pay a certain monthly sum to certain persons so long as they shall be alive, and after their deaths to continue and pay the same to their descendants from generation to generation," though in English law it would give an absolute interest to the first takers, must in Hindu law be construed to give them only a life-interest. The descendants who might be in existence at the time of the death of each life-taker, would take absolutely as a class in equal shares the capital sum sufficient to produce the monthly payments directed. The Court, while expressing its opinion that the grounds of public policy on which the English rule against perpetuities is founded are applicable to the property of Hindus, nevertheless considered that there was no express rule of Hindu law which imposed any restriction in point of time on the operation of a bequest creating a series of successive life-interests in each generation of a legatee's descendants.

Rulings of
the Madras
High
Court.

* 1 Madras H. C. Reports, A. C., p. 400.

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The expression "from generation to generation" is only equivalent to the words also in use among Hindus "for ever" and "while the sun and moon endure."

*Tagore v.
Tagore.*

And in the same spirit, regarding it as unsafe to follow English decisions or rules in construing Hindu wills, the Chief Justice of Bengal, in the case of *Tagore v. Tagore*, declined to concur in the view taken by the Judge who tried the case, that the words "heirs male of their bodies lawfully issuing," as used in the will, were words of limitation sufficient to create general estates of inheritance descendible according to Hindu law, and to pass the whole interest in the property. "The *cy près* doctrine," he said, "has been referred to in argument; but even admitting that the *cy près* doctrine can be properly applied in construing the will of a Hindu (though, according to the principle laid down by the Privy Council for the construction of Hindu wills, I think it cannot be so applied), it is clear that the doctrine does not warrant the construction put upon the will by the Court below. To apply that doctrine, so as to construe words of entail as intending to create general and absolute estates of inheritance, would be to carry the doctrine of *cy près*, in the construction of a Hindu will, to an extent to which it has never as yet been carried in a construction of a will in England."

Rules of
construc-
tion
provided
by Hindu
Wills Act.

The rules* for the construction of wills, provided by the Hindu Wills Act of 1870, preclude the necessity for any

* The most general and important sections applicable to Hindus are the following :—

61. It is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

62. For the purpose of determining questions as to what property is denoted by any words used in a will, a Court must enquire into every

technical words or terms of art being employed in such documents. So long as the intention of the testator can be

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material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

63. Where the words used in the will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

66. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 65 are to be considered as struck out of the will.

67. Where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

68. Where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator shall be admitted.

69. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be considered as part of the will.

70. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in

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ascertained from the express words used, or from plain implication therefrom, effect will be given to such intentions,

a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from other words of the will that the testator meant to use them in such wider sense.

71. Where a clause is susceptible of two meanings, according to one of which it has effect, and according to the other it can have none, the former is to be preferred.

72. No part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

73. If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

75. Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

76. A will or bequest not expressive of any definite intention is void for uncertainty.

77. The description contained in a will of property the subject of gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

82. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

83. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be dead, then the person or class of persons named in the second branch of the alternative shall take the legacy.

85. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

88. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest, instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will :—

unless they be contrary to law. If, however, technical words are used, they must be construed in their technical

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First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will, or one and the same codicil, purports to make in two places a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by will, and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In the four last rules the word “will” does not include a codicil.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

90. Under a residuary bequest the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

91. If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator; and if he dies without having received it, it shall pass to his representatives.

92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy, as was intended for him, shall fall into the residue of the testator's property.

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sense, unless it is quite clear that there was no intention to use them in that sense, but that there was an intention to use them in another and different sense.

Extrinsic evidence may be taken as to every fact, a knowledge of which may conduce to the right application of the words which the testator has used. In order to determine questions as to the object or subject of the will, the Court can take that extrinsic evidence, especially when it relates to the persons who claim to be interested under the will, to the property which is claimed as a subject of disposition, and to the circumstances of the testator and of his family.

It may also be taken to explain a latent ambiguity in a will,—that is, when it is found by extrinsic evidence that the words used admit of more than one application, and where it is necessary, to ascertain which application was intended by the testator; but in the case of a patent ambiguity,—that is, a

95. Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

96. Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the life-time of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's life-time, of the person to whom the bequest is made.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

deficiency on the face of the will in expressing the intentions of the testator, no extrinsic evidence as to those intentions shall be admitted. For instance, if a testator at the time of his death possessed two zemindaries of the same name, and devised one of them by its name, evidence would be admissible to show which of them he intended. But if, having a number of zemindaries, he devises his zemindary, (*blank*) without filling up the name, evidence will not be admissible to show what name he had intended to express, but such devise would be void for uncertainty.

Again, the meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other, and for this purpose a codicil is to be considered as part of the will. In other words, the intention of the testator derived from the whole of the will, and from extrinsic evidence when legally admissible, will fix the sense of ambiguous words, control the sense of clear words, and supply the place of express words.

No part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. If it is susceptible of two meanings, according to one of which it has effect, and according to the other, it has none, the former is to be preferred. If the same words are repeated in a will, they must be taken to be used everywhere in the same sense, unless there appears an intention to the contrary.

If a will or bequest does not express any definite intention, it is void for uncertainty. If the intention cannot take effect to the full extent, effect shall be given to it as far as possible. If two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

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Again, the description contained in a will, of property the subject of gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering to that description at the death of the testator. Again, where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appear from the will that only a restricted interest is intended for him.

What class
of persons
may take
under a
will.

With regard to those limitations upon the power of testamentary disposition, which arise not from any deficiency of proprietary right on the part of a testator, but from the incompetence of a proposed devisee or legatee to become grantee of the intended disposition, and to take the subject of the testator's bounty; the doctrines laid down in the Tagore case must be borne in mind.

"According to Hindu law,"* said Sir Barnes Peacock, "a donee must be capable of accepting the gift. He must, like an heir-at-law, be a sentient being. I apprehend that, according to the general principles of Hindu law, a gift *inter vivos*, or by will, cannot be made to a person not in existence at the time of the gift, or in the case of a will at the time of the death of the testator; and that it cannot be made in such a manner, as that the donee cannot be ascertained at the time at which the property, by virtue of the gift or devise, ceases to be that of the donor or testator.

"The Hindu law knows nothing of an estate *in nubibus* or of a *scintilla juris*; and with the exception of the case of *S. M. Soorjeemonee Dossee v. Deenobundoo Mullick*,† I know of no authority which shows that, under the Hindu law, executory bequests have been sanctioned as part of the

* 4 B. L. R., O. C., p. 188.

† 9 Moore's I. A., p. 135.

system of Hindu law. The principle of that law seems to require that property which passes out of one man must immediately vest in another. This point as regards inheritance was considered in the case of *Kalidas Das v. Krishna Chandra Das*,* and there appears to be no distinction in principle between the creation of property by the annulment of previous right by death, and the creation of property by relinquishment of right by gift."

Again, a devise to a man in such terms as will give him a vested interest for life, subject to trusts for the payment of debts, legacies, and annuities, is as good by Hindu law as it is by English.

With regard to devises to persons to be born or adopted after the death of the testator, a Hindu testator has no power to create estates-tail, and certainly not estates-tail descendible, as was intended by the will of Prosunno Coommar Tagore, to heirs of the body according to the rule of primogeniture. "The right of inheritance, according to Hindu law, is regulated with reference to the spiritual benefits to be conferred on the deceased proprietors. No such estate as an estate-in-tail is known to that law. The statute *de donis* was probably never heard of by a Hindu, and I see no more reason for contending that an estate-in-tail male can be created according to Hindu law, than there is for a similar contention in respect of an estate-in-tail female. The creation of an estate-tail by will might deprive the deceased owner of many spiritual benefits which could be conferred by others than issue male of the body in the fifth degree of descent; and amongst such nearer heirs, there are females and heirs claiming through females, yet no Hindu would, I think, say that

* 2 B. L. R. (F. B.), p. 103.

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a devise to a man and the heirs female of his body, or to heirs claiming through females to the exclusion of his sons, grandsons, and great-grandsons, would not violate the first principles of the Hindu law of inheritance."

Provisions
of Hindu
Wills Act
upon that
subject.

With regard to the limitations to the testamentary power of disposition provided by the Hindu Wills Act, the following are the main rules prescribed:—

First, where the legatee is particularly described, but at the death of the testator, no person exists who answers that description, the bequest is void; as, for example, a bequest to the eldest son of B. is void, if at the death of the testator no son of B. is living. The exceptions to the rule, however, provide for the case of a legatee coming into existence after the death of the testator, provided he does so before the legacy is intended to vest,—that is, generally speaking, before some prior bequest has expired, in that case he or his representatives will take. For instance, in the case of a legacy to B. for life, and after his death to the eldest son of C. Although, at the death of the testator, C. has no son, yet, if a son be born to him during B.'s life, that son or his representatives will take at B.'s death.*

* The following sections are applicable to Hindus:—

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he be dead, to his representatives.

100. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the

Second, a bequest to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed. The power of creating successive interests in property by will is therefore extremely restricted.

Third, the vesting of the thing bequeathed cannot be delayed beyond the life-time of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

These provisions at once dispose of all claim on the part of a Hindu to dispose of his property in perpetuity. The utmost that he can do is to bequeath a fund to a succession of life-takers all living at his death, and after the death of the survivor of them, to some infant then living, to vest upon such infant attaining majority. The latest period for the division of such fund is after the lapse of a period comprising the life of a legatee named in the will, together with the number of years which constitute the age of majority.

will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

101. No bequest is valid, whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void.

103. Where a bequest is void by reason of any of the rules contained in the three last preceding sections, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.

LECTURE XV.

ON CONTRACTS.

General observations—Legal rate of interest amongst Hindus—Rulings of High Court of Bombay—High Court of Bengal—Texts—As respects mortgages—Redemption of mortgage—Sureties—*Chose in action*—Presumption as to disappearance—Champerty and maintenance—Speculative and gambling contracts in aid of litigation.

General
observa-
tions.

ALTHOUGH “all matters of contract and dealing between party and party” are as between Hindus to be treated according to Hindu law, and as between a Hindu and a person governed by a different law, to be treated according to the law of the defendant, yet in practice the principles of English law, as established by the decisions of the Courts in England, are constantly, if not invariably, resorted to in the adjudication upon such matters and dealings. Those decisions form the best and the most accessible repertory of maxims of “justice, equity, and good conscience,” which, in the end, under whatever Charter or Act, it is the object to apply. In a community composed as that of British India, public convenience renders a uniform law of contracts absolutely necessary. In the absence of a code upon that subject, the ordinary maxims of fair dealing must take precedence of any fanciful rules in which Hindu sages, like the Jewish priests, have embodied the duties of their fol-

lowers. Family usages and the law of succession and inheritance may fairly and easily be secured to the race to which they belong; but different races can never live together under the same government and administration of justice in the daily transaction of business, to which they bring different ideas of obligation and right, without considerable inconvenience being the result. In any conflict of laws, however, there is no question between the law of the domicile and the law of the place of contract; the preference is given in its entirety to the personal law of the defendant.

Sir Francis Macnaghten in his *Considerations of Hindu Law** observes:—

“Although it is declared by statute that all matters of contract and dealing between party and party shall be determined, in the case of Hindus, by the laws and usages of Hindus, I never knew or heard of an instance in which the Supreme Court was called upon, in a case of contract, to decide by such laws and usages.”

He said that he did not consider a chapter upon contracts to be necessary in his work, but that the texts which he had collected were interesting and curious. He says that the Hindu system on that head of law appears to be rational and moral. It is abstracted from the Hindu religion, and depends upon ethics alone, and upon principles which are universally admitted. And he adds the further observation, that good faith and fair dealing are required by the institutes of all civilized people.

But with regard to any special rules of the Hindu law of contracts which have never been enforced by the Courts, they must now be considered to have fallen into disuse, and to have ceased to be of any validity. General convenience

* Page 403.

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and the authority derived from usage, according to the received maxims of Hindus, combine to prevent the English law of contracts being displaced in favor of any obsolete rules, and will probably serve to secure its general application until such time as the Legislature shall have matured a Contract Code.

In the preface to Macpherson's *Outlines of the Law of Contracts*, the Section of the Act of Parliament* is quoted:—

“All matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans; and in the case of Gentoos, by the laws and usages of Gentoos; and when only one of the parties shall be a Mahomedan or Gento, by the laws and usages of the defendant.”

And the author adds:—“That applies to the Supreme Court of Calcutta, and there is a similar provision with respect to the Supreme Courts of Madras and Bombay.

“In those Courts which are not established by Royal Charter, it is only in cases regarding ‘succession, inheritance, marriage, caste, and all religious usages and institutions,’† that the Hindu law with regard to Hindus is to be considered the general rule by which the Judges are to form their decisions.

“Cases arising out of contract are left to be determined in general by applying to each the principles of justice, equity, and good conscience. As the equity spoken of must in general follow the same law, it will follow the English law. And accordingly, for a long series of years, the

* 21 Geo. III, c. 70, s. 17.

† Regulation IV of 1793, section 15; Regulation VIII of 1795, section 3.

principles and rules of English law are in such cases usually applied.” LECTURE
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As a Contract Code, it is generally expected, will shortly become the law of British India, the subject of the law of contract amongst Hindus is of less importance than ever, and I shall only offer a very few observations upon it. No special rules, differing from the ordinary provisions of law enforced by the Courts, would probably now be adopted unless some precedent for so doing be shewn. Such rule, if referred to, would probably be deemed to have fallen into disuse. A few rules, specially applicable to Hindus, have, however, been at times enforced by the Supreme Courts and their successors the High Courts in original jurisdiction, and I will shortly notice them before concluding the subject of Hindu law. Such rules are not necessarily to be followed by the Mofussil Courts, who are to shape their decisions by the rules of “justice, equity, and good conscience,” and are not bound to apply Hindu law in cases of contract, except so far as they may consider themselves bound in good conscience to do so.

For instance, the High Court of Bombay* has held that the Hindu law, with regard to the receipt of interest, is as laid down by Menu†:—“Interest on money received at once, not month by month, or day by day, as it ought, must never be more than enough to double the debt,—that is, more than the amount of the principal paid at the same time: on grain, on fruit, on wool or hair, on beasts of burden, lent to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple.‡ Stipulated

* *Dhondo Jagoonath v. Narayan Ramchunder*, 1 Bom. H. C. R., p. 47.

† 8 Menu, verse 151.

‡ Verses 151, 152.

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High Court
of Bombay.

interest beyond the legal rate, and differing from the preceding rule, is invalid; the wise call it an usurious way of lending, the lender is entitled at most to five in a hundred."

In the *Mayukha* it is stated:—"But in any one case where interest is realized by degrees, or at various times also, more than the legal or allowable interest may be levied." And

the rule of law was declared by the Court in this case to be that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum; but if the principal remain outstanding, and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount of interest which may be thus received from time to time.

And again, in a case* referred to the same Court, by the Acting Judge of the Surat district, it was held, following the decision last quoted, that no greater amount of interest than the principal sum can be recovered at any one time, and that Act XXVIII of 1855 has not, by repealing Section 12 of Regulation V of 1827, or otherwise, altered that rule.

High Court
of Bengal.

In recent years the High Court of Bengal has enforced more strictly the special rules in Hindu law relating to interest. In a case† reported in the third volume of the *Bengal Law Reports*, a Hindu brought a suit under the Bills of Exchange Act to recover Rs. 1,200 due on a promissory note. A decree was given for Rs. 700 only, that being, as the evidence showed, the full consideration for the note. Sir B. Peacock said:—"This suit is between two Hindus,

* *Khusalchand Lalchand v. Ibrahim Fakir*, 3 Bombay H. C. Rep., A. C. J., p. 23.

† *Ram Lal Mookerjee v. Haran Chandra Dhar*, 3 B. L. R., O. C. J., p. 130.

and in my opinion it must be determined according to Hindu law. What is said by Sir F. Macnaghten in his *Considerations of Hindu Law* does not get rid of the express directions contained in the High Court Charter that, in such a case as this, we shall administer Hindu law. By English law a contract under seal imports obligation, and the receipt of the amount acknowledged in the contract is evidence of consideration. So by English law a bill of exchange or a promissory note imports consideration. The Privy Council have in a recent case expressed a doubt whether by Hindu law a contract under seal does import consideration. I equally doubt whether by Hindu law a promissory note imports consideration."

With regard to the rate of interest chargeable between *Textas* Hindus,* there are the following texts:—First, one of Menu—"A lender of money may take, in addition to his capital, the interest allowed by Vasishtha, an eightieth part of a hundred by the month." Next, one of Vasishtha—"Hear the interest for a money-lender declared by the words of Vasishtha,† five mashas or one suverna, for twenty palas or eighty suvernas, he may claim and should receive in each month." Again Vrihaspati, as quoted in the *Retnakara*‡:—"The eightieth part accrues monthly on the principal; and if the interest be received, the loan is doubtless doubled in the third of a year less than seven years,—that is, in six years and eight months."

Again, there is a text by Vyasa§:—"Monthly interest is declared to be an eightieth part of the principal if a pledge be

* Colebrooke's Digest, Book I, Chap. II, Sec. I, verse 23.

† *Ibid*, verse 24.

‡ *Ibid*, verse 26.

§ *Ibid*, verse 27.

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given; an eighth part is added if there is only a surety ; and if there be neither pledge nor surety, two in the hundred may be taken from a debtor of the sacerdotal class."

Then, a further text of Menu* :—" If he have no pledge, a lender of money may take two in the hundred in the month, remembering the duty of good men ; for by thus taking two in the hundred, he becomes not a sinner for gain. He may thus take in proportion to the risk and in direct order of the classes : two in the hundred from a priest, three from a soldier, four from a merchant, five from a mechanic or servile man, but never more as interest by the month." Yajnyavalkya ordains† :—" All borrowers who travel through vast forests may pay ten, and such as traverse the ocean twenty in the hundred to lenders of all classes, or whatever interest has been stipulated by them as the price of the risk to the lender."

And Menu‡ :—" Whatever interest or price of the risk shall be settled between the parties by men well acquainted with sea voyages and journeys by land, with times and with places, such interest shall have legal force."

There is an Act passed by the Imperial Legislative Council,—that is, XXVIII of 1855,—for the repeal of the usury laws. Its effect was to repeal the various Regulations and Acts which the English Government had passed on the subject of usury, but not to repeal the Hindu law as to interest.

As respects
mortgages.

Mr. Ellis observes§ that the Hindu Law of Contract being founded entirely on reason, and not on special ordinances, or

* Colebrooke's Digest, Book I, Chap. II, Sec. I, verse 29.

† *Ibid*, verse 32.

‡ *Ibid*, verse 33.

§ See 2 Strange's Hindu Law, p. 472.

national usage, the only observation of which the opinions ranging under this title are susceptible, is a general one,—*viz.*, that, when they contradict common sense, they must be wrong. To this, he says, there is but one exception,—*viz.*, the assignment of rates of interest increasing in the inverse order of the castes: a practice, though expressly ordained by the law, now seldom observed.

It is said, in a work of authority, that there is no law which restricts the mortgagee to the receipt in the whole of interest only equal to the amount of the principal.* And in the case of *Narayan bin Babaji v. Gangaram bin Krishnaji*,† the High Court of Bombay held, in accordance, it is said, with several previous decisions, that the rule of Hindu law which prevents a creditor from recovering interest greater than the amount of the principal did not apply to mortgages.

But Chief Justice Couch, in pronouncing the judgment of the Court in a subsequent case,‡ said that he did not concur in the above decision. The Court considered the rule did apply to mortgages, except in the case where there was an account on both sides between mortgagor and mortgagee,—that is, where principal and interest are charged on one side, and rents and profits on the other. In such a case the rule of Hindu law would not be applied, for it would be inequitable that the interest should cease when it amounts to the same sum as the principal if the rents and profits continue to be charged.

* See Macpherson on Mortgages, p. 204; S. D. A., 1859, p. 1543; and 2 W. R., p. 289.

† 5 Bombay H. C. Rep., A. C. J., p. 157.

‡ Nathubhai Panachand v. Mulchand Hirachand, 5 Bombay H. C. Rep., A. C. J., p. 196.

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"The Hindu law* recognizes no distinction between mortgages of land and pledge of other property, and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. . . . There are numerous written texts in which possession is declared to be absolutely necessary in order to give validity to a contract of mortgage. . . . The original doctrine has been considerably modified, and whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown to the Hindu law."

Redemption of mortgage.

Again, in a suit† for redemption of a mortgage, it was stipulated in the mortgage-deed that there should not be any right of redemption until the expiration of a certain term. According to English law the mortgagor would have no right to redeem until that term had expired. The Court held in this case that the same principle existed in Hindu law,—viz., that the right of the mortgagor to redeem does not, in the absence of any circumstances or language indicating a contrary intention, arise any sooner than the right of the mortgagee to foreclose.

In support of this ruling, the Court referred to Colebrooke's Digest,‡ where Vrihaspati is quoted as saying:—"When a house or field mortgaged for use has not been held to the close of its term, neither can the debtor obtain the property, nor the creditor obtain the debt." And the same *dictum* is repeated,§ with this addition:—"After the

* Macpherson on Mortgages, p. 3.

† Sakharam Sardesai v. Vitto Lakha Gonda, 2 Bombay H. C. Rep., p. 237.

‡ Book I, Chap. III, verse 105.

§ *Ibid*, verse 118.

period is completed, the right of both to their respective property is ordained; but even while it is unexpired, they may restore their property to each other by mutual consent." In two cases between Hindus which arose in the N. W. Provinces, and which are cited in Morley's Digest,* the right of the mortgagor to redeem before the mortgage term had expired was denied by the Court.

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Sureties.

In a suit† against sureties, the principal debtor had not been sued. It was held that the Hindu law was not opposed to the rule of English law by which either the principal or the surety may be sued at the election of the party with whom they have contracted. The principle of the rule is that the contract imposes on the surety the obligation to see to the payment or performance on the part of the principal.

Again, an action‡ was upon a promissory note, and was brought by the widow and executrix of one of the two payees. The question was whether the plaintiff was entitled to sue in her own name. The High Court said that, "according to the Hindu law, a contract is assignable, and the assignee may sue in his own name." The complete remedy upon the contract is vested in the assignee; for not only the beneficial interest in the subject-matter of a contract, but also the contract itself, is transferable.

Chose in
action.

In an action§ against a Hindu upon a bond, it was objected in his behalf that a bond was not a negotiable

* N. S., p. 259.

† Totakot Menon v. Kurusingal Kaku Varid, 4 Madras H. C. Rep., p. 190.

‡ Vembakum Ammal v. P. Moonesawmy Chetty, 4 Madras H. C. Rep., p. 176.

§ Kadarbacha Sahib v. Rangasvami Nayak, 1 Madras H. C. Rep., p. 150.

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instrument, and that the plaintiff, as assignee of a *chose in action*, was not the proper party to sue. Chief Justice Scotland said:—"The rule of Hindu law is the same as that which has always prevailed in English Courts of Equity and in all countries where jurisprudence is founded on the civil law. By the common law of England, no doubt, the assignee of a debt, except in case of the king, must always have sued in the assignor's name, but this is a mere shadow and relic of the old rule that a *chose in action* could not be assigned, and can have no application here. The assignee of a *chose in action* may clearly sue in his own name, whether or not the debtor assents to the transfer."

Presump-
tion as to
disappear-
ance.

Again, upon the question* whether when a Hindu disappears and is not heard of for a length of time, any person can succeed to or take any interest in his property as his heir until after the expiry of twelve years from the date on which he was last heard of,—the High Court of Bengal held that no such right could accrue. There was not much authority upon the subject, but a previous decision of the same Court had reversed a decision of a Zillah Judge who had applied the rule of English law, which provides that a period of seven years' absence is sufficient to raise the presumption of death.

Champerty
and mainte-
nance.

With regard to the subject of champerty and maintenance, the Chief Justice of the Madras High Court† said, "in considering and deciding upon objections to the civil contracts of natives on the ground of maintenance or cham-

* See *Janmajai Mazumdar v. Keshab Lal Ghose* and another, 2 Bengal Law Rep., A. C., p. 134; and see *Guru Das Nag v. Matilal Nag*, 6 Bengal Law Rep., App., p. 16.

† *Pitchakutti Chetti v. Kamala Nayakkam*, 1 Madras High Court Rep., p. 153.

perty, we must look to the general principles as regard-public policy and the administration of justice upon which the law at present rests." To that extent we think the law can properly be adopted and applied in perfect consistency with the Hindu law relating to contracts.* In this case the maintenance is alleged to be the loan of money by the plaintiff to enable the defendant to sue and eject his tenant, but that of itself is not sufficient. There should appear to be the instigation of improper litigation with a bad purpose or motive contrary to public policy and justice.

The leading case, however, on this subject is that of *Grose v. Amirtamayi Dasi*,† in which the validity of a deed by which a litigant had conveyed away all her interest in the subject of suit (half of it absolutely, half of it as security for all disbursements) to a person who agreed in consideration thereof to conduct the suit with due diligence and to the best of his ability, and to find the necessary funds for that purpose, and to maintain the litigant meanwhile, was discussed in reference to the law of champerty and maintenance. The litigant in the case was a Hindu widow, and the reversionary heirs of her husband sued to set the deed aside. It appeared that the brothers of the litigant's deceased husband had upon his death taken possession of the whole of his estate, and had ever since held and enjoyed the same and received the profits and accumulations thereof, and had disputed the right of the litigant to any portion of her husband's estate, and that she being a widow and unable personally to appear in public and having no knowledge of business, and having been reduced to extreme poverty and distress in consequence of her being unable

* See Strange's Hindu Law, Vol. I, p. 275.

† 4 Bengal Law Rep., O. C. J., p. 27.

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to procure any money from the estate of her late husband, even for her maintenance, and being unable in consequence of such poverty to institute proceedings to obtain an account of the estate, had applied for assistance to the person who subsequently became the grantee in the deed, and who claimed on the successful prosecution of the suit to be entitled to all its fruits according to the terms of the deed.

Under those circumstances the High Court of Bengal set aside the deed as regards the moiety of the subject of suit which had been conveyed away absolutely by the litigant, and upheld it with regard to the moiety which was to stand security for all disbursements made.

With regard to the subject of champerty and maintenance they referred to the dictum* of the Privy Council, in which they said that champerty or maintenance "was something which must have the qualities attributed to champerty or maintenance by the English law. It must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary."

Speculative
and
gambling
contracts
in aid of
litigation.

With regard to that portion of the deed which conveyed away the moiety of the subject of the suit absolutely, they said it was "not binding against the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative if not gambling contract."†

* See *Fisher v. Komala Naichar*, 8 Moore's Indian Appeals, p. 187.

† See *Raja Saheb Prahlad Sen v. Baboo Baldeo Sing*, 2 Bengal Law Rep., P. C., p. 111.

It has been laid down in some cases decided by the late Sudder Court of Bengal that there is no law against champerty or maintenance in the Mofussil. However that may be, they did occasionally set aside deeds or agreements which amounted to mere speculation or gambling in suits, as illegal, because contrary to public policy.* And that that was a sound principle to act upon was recognized by the High Court in the case of *Grose v. Amirtamayi Dasi*.†

An agreement is void, said one learned Judge‡ in the Court of Appeal, if “as a whole it is something against good policy and justice, something tending to promote unnecessary litigation which in a legal sense is immoral; and therefore by the law of the Mofussil Courts as by the law of the High Court in its ordinary original civil jurisdiction, and whether the parties be European or Hindus, such an agreement is against good policy, and void. The ‘traffic of merchandizing in quarrels and huckstering in litigious discord’ prevails in this country to a very lamentable and most pernicious extent; and it appears to me that the practice is in the highest degree against good policy.”

* See *Ramgolan Sing v. Keerut Sing*, Select Reports (new edition), Vol. IV, p. 16; 4 S. D. R., p. 12; *Brijnarain Sing v. Teknarain Sing*, 6 S. D. R., p. 131; and other cases.

† 4 Bengal Law Rep., O. C. J., p. 27.

‡ See judgment of Macpherson, J., 4 Bengal Law Rep., O. C., p. 49.



APPENDIX.

REGULATION VII.—A. D. 1832.

A Regulation for modifying certain of the Provisions of Regulation V, 1831, and for providing supplementary Rules to that enactment: Passed by the Vice-President in Council on the 16th October 1832.

VIII. Such part of Clause second, Section III, Regulation VIII, 1795, enacted for the province of Benares, which declares that "in causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Mahomedans or Hindoos, shall be defendants, in which case the law of the plaintiff is to be made the rule of decision in all plaints or actions of a civil nature," is hereby rescinded, and the rules contained in Section XV, Regulation IV, 1793, and the corresponding enactment contained in Clause first, Section XVI, Regulation III, 1803, shall be the rule of guidance in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions that may arise between persons professing the Hindoo and Mahomedan persuasions respectively.

IX. It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bonâ fide* professors of those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindoo, and the other of the Mahomedan persuasion, or when one or more of the parties to the suit shall not be either of the Mahomedan or Hindoo persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity,

and good conscience: it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles.

ACT XXI OF 1850.

An Act for extending the principle of Section 9, Regulation VII, 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company.

WHEREAS it is enacted by Section IX, Regulation VII, 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindoo, and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindoo persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company: It is enacted as follows:—

I. So much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

ACT XV OF 1856.

An Act to remove all legal obstacles to the Marriage of Hindoo Widows.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the government of the

Preamble.

East India Company, Hindoo widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property: and whereas many Hindoos believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindoos who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences: and whereas it is just to relieve all such Hindoos from their legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindoo widows will tend to the promotion of good morals and to the public welfare: It is enacted as follows:—

I. No marriage contracted between Hindoos shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindoo law to the contrary notwithstanding.

II. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died: and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

III. On the re-marriage of a Hindoo widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them,

during their minority, in the place of their mother: and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

IV. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

V. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

VI. Whatever words spoken, ceremonies performed, or engagements made on the marriage of a Hindoo female who has not been previously married are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindoo widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

VII. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative. All persons knowingly abetting a marriage made contrary to the provision of this section, shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both. And all marriages made contrary to the provisions of this section may be declared void by a court of law. Provided that, in any

question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is
 Effect of such marriage. aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated. In the case of a widow
 Proviso. who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

ACT XXI OF 1870.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 19TH JULY 1870.)

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists, in the Lower Provinces of Bengal and in the Towns of Madras and Bombay.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay; It is hereby enacted as follows:—

1. This Act may be called “The Hindu Wills Act, 1870.”

2. The following portion of the Indian Succession Act, 1865, namely,—
 Sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive),
 Sections 82, 83, 85, 88 to 133 (both inclusive),
 Sections 106 to 177 (both inclusive),
 Sections 179 to 189 (both inclusive),
 Sections 191 to 199 (both inclusive),
 So much of Parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and Parts XXXIII to XL (both inclusive) so far as they relate to an executor and an administrator with the will annexed, shall, notwithstanding anything contained in section 331 of the said Act, apply—

(a) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September 1870, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside these territories and limits, so far as relates to immoveable property situate within those territories or limits :

Provisos.

3. Provided that marriage shall not revoke any such will or codicil :

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section 2 of this Act, he could not deprive them by will :

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos* :

And that nothing herein contained shall affect any law of adoption or intestate succession :

And that nothing herein contained shall authorise any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September 1870.

4. On and from that day, section two of Bengal Regulation V of 1799 shall be repealed so far as relates to the executors of persons who are not Mahomedans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay, respectively.

6. In this Act and in the said sections and parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words, respectively.

And, in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, and 182 of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. And in making grants under this Act of letters of administration with the will annexed, or with a copy of the will annexed, section 195 of

the said Succession Act shall be construed as if the words " and in case the Hindu Wills Act had not been passed" were added thereto, and section 198 of the said Succession Act shall be construed as if, after the word " intestate" the words " and the Hindu Wills Act had not been passed" were inserted ; and sections 230 and 231 of the said Succession Act shall be construed as if the words " if the Hindu Wills Act had not been passed" were added thereto, respectively.

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